Supreme Court, U. S.
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MAY 27 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1481

AMERICAN MOTORISTS INSURANCE COMPANY,

Appellant,

v.

VIRGIL B. STARNES,

Appellee.

ON APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS, TENTH SUPREME JUDICIAL DISTRICT

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SIR SPEEDY INSTANT PRINTING, SAN ANTONIO

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AMERICAN MOTORISTS INSURANCE COMPANY,

Appellant,

v.

VIRGIL B. STARNES,

Appellee.

ON APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS, TENTH SUPREME JUDICIAL DISTRICT

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Court of Civil Appeals of Texas, Tenth Supreme Judicial District, entered on October 17, 1974, affirming the judgment of the 74th Judicial District Court of McLennan County, Texas, overruling appellant's plea of privilege to be sued in the county of its residence and principal office, Dallas County, Texas, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented.

OPINION BELOW

The opinion of the Court of Civil Appeals of Texas for the Tenth Supreme Judicial District is reported at 515 S.W. 2d 354, and is attached hereto, together with other pertinent orders of the lower courts and appellant's Notice of Appeal, as Appendix A.

JURISDICTION

The judgment of the Texas Court of Civil Appeals was entered on October 17, 1974. A timely motion for rehearing was filed on October 31, 1974, and overruled on November 21, 1974. Appellant filed a timely application for writ of error with the Supreme Court of Texas on January 2, 1975, and this application was dismissed for want of jurisdiction on February 26, 1975, without an opinion. Notice of appeal to the Supreme Court of the United States was filed in the Texas Court of Civil Appeals for the Tenth Supreme Judicial District on March 18, 1975. The jurisdiction of the Supreme Court of the United States to review the decision of the Texas Court of Civil Appeals is conferred by Title 28, U.S.C. Section 1257 (2). This appeal presents precisely the same question as to which the Supreme Court noted probable jurisdiction during its October Term, 1973, in *Exxon Corporation v. Jay M. Preston*, No. 73-232, on November 19, 1973, 414 U.S. 1038. After Exxon filed its brief in the Supreme Court on January 8, 1974, plaintiff-appellee Preston communicated to the Supreme Court, in an instrument styled "Express Waiver of Right to File Brief in Opposition," his agreement to change venue from Jefferson County to Harris County, as sought by Exxon. Thereafter, the

Supreme Court, on February 19, 1974, ordered that the prior judgment of the Court of Civil Appeals of Texas, Ninth Supreme Judicial District, affirming the trial court's overruling of Exxon's plea of privilege, be vacated, and that the cause be remanded for consideration of the question of mootness. On June 13, 1974, the Texas Court of Civil Appeals determined that the venue issue had indeed become moot, and the opinion of that Court is set forth in this Statement at Appendix B. The instant appeal effects the legal resurrection of this vitally important, substantial federal question.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statute here involved is the general venue statute of the State of Texas, Tex. Rev. Civ. Stat. Ann. art. 1995 (1950), which provides in pertinent part:

> "No person who is an inhabitant of this State shall be sued out of the county in which he has his domicile except in the following cases:
>
> * * * *
>
> "3. Non-residents; residence unknown. — If one or all of several defendants reside without the State or if their residence is unknown, suit may be brought in the county in which the plaintiff resides.
>
> * * * *
>
> "23. Corporations and associations. — Suits against a private corporation, association, or joint stock company may be brought in the county in which its principal office is situated; or in the county in which the cause of action or part thereof arose; *or in the county in which the plaintiff resided at the time the cause of action or part thereof arose, provided such corporation, association or company has an agency or representative in such county; or, if the corporation, association, or joint stock company had no agency or representative in the county in which the plaintiff resided at the time the cause of action or part thereof arose, then suit may be brought in the county nearest that in which plaintiff resided at said time in which the corporation, association or joint stock company then had an agency or representative.* Suits against a railroad corporation, or against any assignee, trustee or receiver operating its railway, may also be brought in any county through or into which the

> railroad of such corporation extends or is operated. Suits against receivers of persons and corporations may also be brought as otherwise provided by law.
>
> * * * *
>
> "27. Foreign corporations. — *Foreign* corporations, private or public, joint stock companies or associations, not incorporated by the laws of this State, and doing business within this State, may be sued in any county where the cause of action or a part thereof accrued, *or in any county where such company may have an agency or representative*, or in the county in which the principal office of such company may be situated; or, when the defendant corporation has no agent or representative in this State, then in the county where the plaintiffs or either of them, reside." (emphasis added)

Subdivision 27, which provides an alternative county for venue of suits against foreign corporations only, is the portion of the statute being challenged.

The provision of the United States Constitution here involved is the Equal Protection Clause of the Fourteenth Amendment.

QUESTION PRESENTED

Whether that portion of subdivision 27 of Article 1995 which allows a foreign corporation, authorized to do business in Texas, to be sued in *any* county where it has an agent or representative, without regard to where the plaintiff resided at the time his cause of action arose, is repugnant to the Equal Protection Clause of the Fourteenth Amendment, inasmuch as there is no rational basis for Texas' distinction for venue purposes between a foreign corporation author-

ized to do business in Texas and a domestic corporation, which, regardless of where it has an agent or representative, may only be sued in a county away from that of its residence or principal office upon proof under subdivision 23 that the plaintiff resided in or near such county at the time his cause of action arose, a showing which under Texas law requires the plaintiff, at a preliminary venue hearing, to prove the existence of his cause of action by a preponderance of the evidence.

STATEMENT OF THE CASE

Appellee, Starnes, a resident of McLennan County, Texas, filed suit in McLennan County against appellant, American Motorists Insurance Company, an Illinois corporation authorized to do business in Texas with its principal office in Dallas County, under the uninsured motorist provisions of a liability insurance policy issued to appellee by appellant. The automobile collision out of which this cause of action and appellee's damages arose occurred in Fort Worth, Tarrant County, Texas. Process was served, in accordance with Texas law, upon appellant's statutorily designated process agent, the Chairman of the State Board of Insurance at Austin, Travis County, Texas. Appellant filed a plea of privilege[1] to be sued in the county of its residence, Dallas County.[2] Appellee filed a controverting plea,[3]

[1] A plea of privilege is a verified pleading by which, under Texas practice, a defendant challenges the venue of a suit. Rule 86, Texas Rules of Civil Procedure.

[2] For purposes of Article 1995, "domicile" means residence, *Snyder v. Pitts*, 241 S.W. 2d 136 (Tex. 1951).

[3] A controverting plea is a verified pleading by which, under Texas practice, the plaintiff states specifically the grounds relied upon to confer venue under one or more of the subdivisions of Article 1995. Rule 86, Texas Rules of Civil Procedure.

asserting venue in McLennan County under both subdivisions 23 and 27, but at the hearing relied exclusively upon subdivision 27[4] and a stipulated showing that appellant was a foreign corporation transacting business in Texas and that it did have a local agent in McLennan County. Appellee was not required, nor did he attempt, to offer evidence as to any of the constituent elements of his cause of action during the course of the plea of privilege hearing. The trial court overruled appellant's plea of privilege. Appellant argued before the Texas Court of Civil Appeals, Tenth Supreme Judicial District, that subsection 27 is unconstitutionally discriminatory, because it permits a foreign corporation authorized to transact business in Texas to be venue bound without plaintiff's having to prove a cause of action, but only by proof of the existence within the venue county of defendant foreign corporation's agent, as compared with the requirement of subdivision 23, as construed by the Texas Courts,[5] that a Texas domestic corporation can be venue bound only upon

[4] Plaintiff's residence in the county wherein he filed this action is not material to the establishment of venue in such county under subdivision 27.

[5] Subdivision 23 requires that the plaintiff prove all the elements of his cause of action when he seeks thereunder to sue a domestic corporation away from its principal office or in a county other than where the cause of action arose. *Victoria Bank & Trust Co. v. Monteith*, 158 S.W. 2d 63, 66 (Tex. Comm'n App. 1941). In an uninsured motorists case, plaintiff must offer evidence establishing, by a preponderance of the evidence, both the making of the insurance contract and its breach, i.e., that the other vehicle was an "uninsured automobile" within the meaning of the policy, *Employers Casualty Co. v. Clark*, 491 S.W. 2d 661, (Tex. 1973), that the uninsured motorist was negligent upon the occasion in question, and that such negligence was a proximate cause of plaintiff's injuries.

proof of each and every element of the cause of action by a preponderance of the evidence. The Court of Civil Appeals, relying primarily upon what it deemed to be a prior authoritative holding of the Texas Supreme Court,[6] and declining an invitation to re-examine the question in the light of the United States Supreme Court's then recent orders in *Exxon Corporation v. Preston*, supra, affirmed the judgment of the trial court. Appellant then applied to the Texas Supreme Court for a writ of error, but that court dismissed appellant's writ of error for want of jurisdiction, thus presenting this Court with a viable, ripe, and extremely important constitutional issue that has not only created much conflict among the appellate courts of Texas (see Appendix C hereto) but has adversely affected, and continues to adversely affect, not only this appellee, but also many of the nation's largest corporations which transact business daily in Texas, under much the same degree of State supervision and control as Texas domestic corporations, but which are, for one reason or another, incorporated under the laws of another state.[7]

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[6] *Commercial Ins. Co. v. Adams*, 369 S.W. 2d 927 (Tex. 1963), refusing writ of error, 366 S.W. 2d 801 (Tex. Civ. App. 1963). [A copy of the Court of Civil Appeals' decision and the Supreme Court's per curiam decision are reproduced herein as Appendix C]

[7] Appendix C to the very comprehensive Statement filed in the United States Supreme Court in *Exxon Corporation v. Preston* contained information from authoritative sources to the effect that of the fifty largest corporations *headquartered* in Texas during 1972, only nine were domestic corporations.

THE QUESTION IS SUBSTANTIAL

Appellant is an Illinois corporation, organized for the purpose of conducting the business of insurance, and transacting business in Texas under a certificate of authority granted by the Texas State Board of Insurance Commissioners. Appellant secured its certificate of authority, and has conducted its business in Texas, under the same comprehensive regulatory scheme applicable to Texas domestic insurance corporations.[8] Moreover, in accordance with the Texas Insurance Code, appellant has designated the Chairman of the State Board of Insurance Commissioners as its duly authorized attorney in fact for the purpose of accepting service of process in any suit brought against it in any court of the State of Texas. Appellant's residence, for venue purposes, is its principal place of business, in Dallas County, Texas. Because appellant did not, for reasons of its own, initially acquire its corporate status within the State of Texas and under the laws of the State of Texas pertinent to insurance corporations, and for no other reason, it is denied the procedural and substantive safeguards that the Texas venue statute secures for Texas domestic corporations. The judgment of the court below, upholding the constitutionality of subdivision 27 of article 1995 over appellant's claim that it denies foreign corporations authorized to do business in Texas the equal protection of the laws, is in direct conflict with this Court's prior decision in *Power Mfg. Co. v. Saunders*, 274 US. 490 (1927). The sole issue presented in this appeal is whether a foreign corporation authorized to do business in a state may, for venue purposes, consistent with the Equal Protection Clause, be treated differently from

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[8] V.A.T.S. Insurance Code, Art. 21.43

a domestic corporation. *Saunders* holds that it may not.

In *Saunders*, this Court was confronted with an Arkansas venue statute which allowed foreign corporations, regardless of whether they were authorized to transact business in Arkansas, to be sued in any county of the State on a transitory cause of action, while domestic corporations could be sued only in counties in which they were doing business or were maintaining an office, officer or agent. Referring to foreign corporations authorized to do business in a state and having a fixed place of business and an authorized agent on whom process may be served, this Court held that "so far as their situation has any pertinence to the venue of transitory actions it is not distinguishable from that of domestic corporations and individuals." 274 U.S. at 494. While the statutory scheme in Texas is different in several respects from the Arkansas statutes upon which this Court passed judgment in *Saunders*, these differences are not material to the instant appeal. It is the fact of different treatment, rather than the nature or extent of the difference, which offends the Equal Protection Clause. The Texas statute, article 1995, establishes broader venue, and different procedural and substantive treatment, for all foreign corporations, whether or not authorized to do business in Texas, than is provided for Texas domestic corporations.

Subdivision 27 of article 1995 allows suits against foreign corporations, including those, such as this appellant, who have secured specific authorization to conduct business in Texas in accordance with its laws, to be brought *inter alia* "in any county where such company may have an agency or representative." Under subdivision 23, however, suits against domestic

corporations may be brought outside the county where the cause of action arose or the county in which the company's principal office is located only upon proof by the plaintiff that the defendant corporation has an agency or representative in the county of suit *and* that plaintiff resided in or near such county at the time his cause of action arose, a showing which under Texas law requires the plaintiff, at a preliminary venue hearing, to prove the existence of his cause of action by a preponderance of the evidence.

Because of the judicial engrafting of the requirement that a plaintiff prove each and every element of his cause of action, in order to sustain venue against a domestic corporation under subdivision 23, it is apparent that venue, *Texas style*, involves a number of practical, procedural considerations (not the least of which is discovery) over and above the matter of the geographical situs of a lawsuit.

Because subdivision 27 does not require a plaintiff to prove, by a preponderance of the evidence, the elements of his cause of action at the preliminary venue hearing, foreign corporations authorized to do business in Texas are deprived of a very valuable opportunity to obtain a virtual preview of plaintiff's case-in-chief, to cross-examine his witnesses, and to nip a frivolous or baseless claim in the bud, preventing it from developing into a cumbersome, time-consuming lawsuit. In view of the right of either party to demand that a jury determine the venue facts,[9] a defendant foreign corpo-

[9] *Merryman v. Zeleny*, 143 S.W. 2d 410 (Tex. Civ. App. 1940). Note: But if the jury is demanded by the defendant, the trial court may in its discretion require that the entire cause be tried on its merits at the same time. Rule 87, Texas Rules of Civil Procedure.

ration is also deprived of the opportunity to obtain a preliminary assessment by a jury of the plaintiff's credibility.

To place these procedural considerations within the context of the instant appeal, appellant's basic right to be sued in the county of its residence, i.e., principal place of business, was defeated by appellee without his having to make any showing of a cause of action against appellant. Were appellant a Texas domestic corporation, he would have been entitled to such a showing under subdivision 23.

The State of incorporation is the only difference between appellant and its counterparts who are Texas domestic corporations. They all are subject to the Texas Insurance Code, secure the same certificate of authority from the State Board of Insurance, sell policies the form and substance of which have been reviewed and approved by the Board, and conduct their Texas business activities under the supervision of the Board. Given the above similarities, there is no rational justification for treating any[10] foreign corporation authorized to do business in Texas differently, for venue purposes, from its domestic corporate counterpart. The ultimate test of the validity of subdivision 27 is not whether foreign corporations selling insurance (or doing any other lawful business) in Texas differ from their domestic counterparts, but whether the differences between them are pertinent to the subject with respect to which the classification is made. *Metropolitan Casualty Insurance Co. of New York v. Brownell*, 294 U.S.580 (1935).

[10] The *Texas Business Corporation Act*, although not applicable to corporations organized for the purpose of conducting the business of insurance, does place foreign corporations authorized to do business in Texas under the same, or substantially similar, controls as those applicable to Texas domestic corporations.

It is submitted that the classification created by subdivisions 23 and 27 of the Texas venue statute, to the extent that it arbitrarily discriminates between foreign corporations authorized to do business in Texas and domestic corporations, is totally without justification. Almost fifty years have elapsed since *Saunders*. Today, foreign corporations who have taken affirmative action to secure specific authorization from a state to conduct business within its borders are subject to considerably more stringent controls than they were when this Court first condemned the same kind of classification with which appellant is confronted. There is absolutely no constitutionally permissible basis for classifying them differently as to venue.

The only justifications ever advanced by the appellate courts of Texas for treating a foreign corporation authorized to do business in Texas differently, for venue purposes, from a domestic corporation, are set forth in the *Adams* case (see Appendix C hereto). They all fail to sustain the classification because they either concern matters not pertinent to venue (such as service of process) or they simply fail to recognize or appreciate the very comprehensive controls which Texas State agencies (in the case of this appellant, the State Board of Insurance) exercise over those foreign corporations who voluntarily submit to these controls in conjunction with their acquisition of certificates of authority. To arbitrarily lump all foreign corporations together, regardless of whether they have

secured authorization to do business in Texas, is patently illogical. This is the fly in the ointment of the Texas venue statute.

The great majority of the largest corporations doing business in Texas, and those making no small contribution to its welfare, were incorporated in Delaware. The great majority of corporations engaged in the business of insurance in Texas were incorporated elsewhere. These so-called "foreign" corporations, who have secured specific authorization to do business in Texas, and thereby subjected themselves to much the same effective controls that govern Texas domestic corporations, have established their principal offices in Texas and made substantial capital investments incident to Texas enterprises. It is strangely ironic that Texas continues to treat such authorized foreign corporations as if they were "fly-by-night" operatives, against whom any aggrieved Texan could initiate legal proceedings in any county where he could "find" a company agent.

Subdivision 27 is clearly repugnant to the Fourteenth Amendment. Not only does it provide broader venue in suits against authorized foreign corporations than that provided by subdivision 23 for suits against domestic corporations, but it deprives foreign corporations of the right to require proof by a plaintiff of each element of his cause of action in order to sustain venue in a county away from the corporation's principal office.

The question presented by this appeal is substantial. It is ripe for decision. Given the symmetry of State control over both domestic and authorized foreign corporations with respect to their Texas enterprises,

Saunders would shudder at such arbitrary classification as Texas presently continues to enforce with respect to venue.

Respectfully submitted,

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HOFFMAN & RUSSELL
SHEEHY, LOVELACE & MAYFIELD

CERTIFICATE OF SERVICE

I hereby certify that on this the 23rd day of May, 1975, three copies of the foregoing Jurisdictional Statement were mailed, postage prepaid, to Fred Horner, Dunnam, Dunnam & Dunnam, 4125 West Waco Drive, Waco, Texas 76710, attorneys for appellee. I further certify that all parties required to be served have been served.

. . . . . .
Joel W. Westbrook

Appendix A

AMERICAN MOTORISTS INSURANCE COMPANY,
Appellant,
v.
Virgil B. STARNES, Appellee.
No. 5362.
Court of Civil Appeals of Texas,
Waco.
Oct. 17, 1974.
Rehearing Denied Nov. 21, 1974.

McDONALD, Chief Justice.

This is a venue case involving Subdivision 27, Article 1995 Vernon's Ann.Tex.Civ.St.

Plaintiff Starnes sued defendant Insurance Company in McLennan County. Defendant filed plea of privilege to be sued in Dallas County. Plaintiff controverted asserting venue in McLennan County under Subdivision 27.

It was stipulated defendant was a foreign corporation transacting business in Texas, and that it had a local agent in McLennan County.

The trial court overruled defendant's plea of privilege.

Defendant appeals on one point: "The trial court erred in holding that venue in McLennan County was established under Subdivision 27, V.A.T.S. 1995 by a limited showing that defendant was a foreign corporation with a local recording agent in McLennan County".

Defendant asserts the question here is whether or not Subdivision 27 is unconstitutionally discriminatory because it permits a foreign corporation to be venue bound without proving a cause of action, but only by proof of the existence within the venue county of defendant foreign corporation's agent as compared with the requirement that a Texas domestic corporation can be venue bound under Subdivision 23 only if the existence of a cause of action is demonstrated.

The question has been decided adversely to defendant by our Texas Supreme Court in *Commercial Ins. Co. of Newark, New Jersey v. Adams*, S.Ct., 369 S.W.2d 927; and holds that exception 27, Article 1995 is not void and unconstitutional under the 14th Amendment to the United States Constitution as affording a wider venue action against foreign corporations than is afforded against domestic corporations under Section 23 of the same Article. To the same effect are *Great American Ins. Co. v. Sharpstown State Bank* (Tex.Civ. App. Austin) W/E Dismd., 422 S.W.2d 787; *Reliance Ins. Co. v. Falknor*, (Tex.Civ.App. Houston 1st) NRE, 492 S.W.2d 721; and *National Life and Accident Ins. Co. v. Notter*, (Tex.Civ.App. Waco) W/E Dismd., 455 S.W.2d 322. In *Notter*, the United States Supreme Court on March 22, 1971 "dismissed appeal for want of jurisdiction", and "denied petition for writ of certiorari", 401 U.S. 969, 91 S.Ct. 1196, 28 L.Ed.2d 319.

Defendant urges that in *Humble Oil & Refining Co. (Exxon Corp. Successor) v. Preston*, (Tex.Civ.App. Beaumont) W/E Dismd., 437 S.W.2d 956, presenting the question, the U.S. Supreme Court noted "probable jurisdiction", 414 U.S. 1038, 94 S.Ct. 538, 38 L.Ed.2d 328, that thereafter appellee advised the U.S. Supreme

Court he no longer opposed change of venue; and that court then remanded the case to the Beaumont Court of Civil Appeals to consider whether the venue issue was moot, 415 U.S. 904, 94 S.Ct. 1394, 39 L. Ed2d 459, and that we should reexamine the question and declare Subdivision 27 unconstitutional; See also *Humble Oil & Refining Co. (Exxon Corp. Successor) v. Preston*, Beaumont Tex.Civ.App., NWH, – S.W.2d –. (dated June 13, 1974).

Since the U.S. Supreme Court dismissed appeal and denied writ of certiorari in *Notter*, supra, presenting the same question in March, 1971, we adhere to our holding in *Notter*, and the Texas Supreme Court in *Adams*, supra.

Defendant's point is overruled.

Affirmed.

COURT OF CIVIL APPEALS

TENTH SUPREME JUDICIAL DISTRICT

P.O. BOX 1606

WACO, TEXAS 76703

R. I. GAGE, CLERK
PEARL REUWER, DEPUTY CLERK

November 21, 1974

FRANK G. McDONALD, CHIEF JUSTICE
VIC HALL, ASSOCIATE JUSTICE
JOHN A. JAMES, JR., ASSOCIATE JUSTICE

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RE: Cause No. 5362
American Motorists Ins. Co. v.
Virgil B. Starnes

from McLennan County

Gentlemen:

You are notified that the Appellant's Motion for Rehearing in the above cause was this day

OVERRULED

in the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas, at Waco.

Yours truly,

R. I. GAGE, Clerk

By:
Pearl Reuwer, Deputy

CLERK'S OFFICE — SUPREME COURT

Austin, Texas, Feb. 26, 1975

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of AMERICAN MOTORISTS INS. CO. v. STARNES, No. B-4994 was this day dismissed for want of jurisdiction.

Very truly yours,

GARSON R. JACKSON, Clerk

No. 5362

IN THE COURT OF CIVIL APPEALS
FOR THE
TENTH SUPREME JUDICIAL DISTRICT
OF TEXAS
AT WACO, TEXAS

AMERICAN MOTORISTS INSURANCE COMPANY,

Appellant

VS.

VIRGIL B. STARNES,

Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Now comes American Motorists Insurance Company and files this its Notice of Appeal to the Supreme Court of the United States and in this regard would show the following:

1.

October 17, 1974, this honorable Court affirmed the order of the trial court of which order American Motorists Insurance Company had appealed to this Court. American Motorists Insurance Company's motion for rehearing was denied on November 21, 1974 and its application for Writ of Error to the Supreme Court of Texas was dismissed for want of jurisdiction on February 26, 1975.

2.

American Motorists Insurance Company hereby gives notice of appeal to the Supreme Court of the United States under Title 28, United States Code, Sec. 1257(2).

Respectfully submitted,
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By /S/
Philip E. McCleery
ATTORNEYS FOR
AMERICAN MOTORISTS
INSURANCE COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Appeal was on this the 14th day of March, 1975, forwarded by prepaid United States certified mail, return receipt requested, to Mr. Fred Horner, DUNNAM, DUNNAM & DUNNAM, 4125 West Waco Drive, Waco, Texas, 76710, Attorneys for Virgil B. Starnes.

/S/
Philip E. McCleery

Appendix B

FILED

JUN 13 1974

ELIZABETH LeBLANC, CLERK,
COURT OF CIVIL APPEALS
NINTH SUPREME JUDICIAL DISTRICT
BEAUMONT, TEXAS

NO. 7395

HUMBLE OIL & REFINING COMPANY
(EXXON CORPORATION, SUCCESSOR)
Appellant,

v.

JAY M. PRESTON, Appellee

Pursuant to the mandate of the Supreme Court of the United States, we reconsider our prior judgment wherein the supporting opinion is reported in 487 S.W.2d 956. After the writ of error had been dismissed by the Supreme Court of Texas, Exxon appealed to the Supreme Court of the United States and that court noted probable jurisdiction. 414 U.S. 1038, 38 L.Ed.2d 328, 94 S.Ct. 538 (1973). Thereafter, plaintiff filed his motion in the District Court of Jefferson County, from which this case was appealed, seeking for the first time to "withdraw" his opposition to Exxon's plea of privilege. Without stating any reason therefor, the trial court overruled the motion, the order being entered on December 27, 1973.

Exxon filed its brief in the Supreme Court of the

United States on January 8, 1974, at which time the only remaining steps in the appeal were (a) the filing of plaintiff's brief, (b) oral argument, and (c) the announcement of the decision. These final steps were not taken because, on January 23, 1974, plaintiff filed an instrument in the Supreme Court styled "Express Waiver of Right to File Brief in Opposition" wherein he recounted his efforts to persuade Judge Clayton to permit the withdrawal of his opposition to Exxon's plea of privilege. Plaintiff averred his agreement "to change venue from Jefferson County to Harris County", as sought by Exxon, and contended that such action on his part had rendered moot the challenge to the constitutionality of *subdivision 27, Art. 1995, V.A.C.S.*

Thereafter, the Supreme Court of the United States vacated the judgment of this court and remanded the cause for consideration of the question of mootness, the order reading in part as follows:

> "ON CONSIDERATION WHEREOF, it was ordered and adjudged on February 19, 1974, by this Court that upon receiving and filing the appellee's (plaintiff's) waiver of right to file an opposing brief with his representation that he no longer opposes the change of venue of the litigation to Harris County, Texas, judgment of the said Court of Civil Appeals in this cause be vacated with costs, and that this cause be remanded to the Court of Civil Appeals of the State of Texas, Ninth Supreme Judicial District, *to consider whether the venue issue has become moot.*" (U.S. ,39 L.Ed.2d 459, 94 S.Ct. 1394 (1974); emphasis supplied)

We directed the filing of briefs confined to the question of mootness and have been favored with a brief by Exxon contending that the issue is viable and not moot. Plaintiff filed no brief, contenting himself with the filing of an instrument wherein "he expressly waives his right to file a Brief in response to Appellant's Brief filed herein on April 8, 1974."

We do not recount the factual structure of this case because on remand our Court must follow the rule so well stated in *Hermann v. Brownell*, 274 F.2d 842, 843 (9th Cir. 1960):

> "When a case is appealed from this Court to the Supreme Court, this Court completely loses jurisdiction of the cause. Thereafter, our jurisdiction can be revived only upon the mandate of the Supreme Court itself, and even upon such restoration, the jurisdiction of this Court is rigidly limited to those points, and those points only, specifically consigned to our consideration by the Supreme Court.
>
> "In the instant case, this Court is functioning under such a remand. Consequently, our jurisdiction is strictly limited by the Supreme Court's mandate. That mandate is our compass and our guide."

Under Texas law, venue rulings acquire the same finality as judgments on the merits. *Wichita Falls & S. R. Co. v. McDonald*, 141 Tex. 555, 174 S.W.2d 951, 952 (1943); *Williams v. Pitts*, 151 Tex. 408, 251 S.W.2d 148, 149-150 (1952). However, the power of the trial court to try the case on the merits is not suspended during the pendency of an appeal from an order overruling the plea of privilege. *Allen v. Wood-*

ward, 111 Tex. 457, 239 S.W. 602, 22 A.L.R. 1253 (1922); *Ex parte Scott*, 133 Tex. 1, 123 S.W.2d 306, 310 (1939); *Smith v. Crockett Production Credit Association*, 372 S.W.2d 956, 959 (Tex.Civ.App., Houston, 1963, error ref. n.r.e.).

Thus, even while the venue ruling is upon appeal, the trial court retains the basic lawsuit for trial on the merits and, upon an appropriate motion by the plaintiff, may grant a nonsuit of the entire case. Unquestionably, had plaintiff made such a motion in the trial court, the venue appeal would have become moot. *McNeill v. Hubert*, 119 Tex. 18, 23 S.W.2d 331 (1930). See also, *Slaughter v. Carter*, 410 S.W.2d 496 (Tex.Civ.App., Waco, 1966, no writ), and cases therein cited.

Plaintiff made no such motion in the trial court for a very obvious reason: his cause of action, upon refiling, would have been barred by the two-year statute of limitation, *Art. 5526, V.A.C.S.*

As presented originally by the pleadings in the trial and the appellate courts, the ultimate issue in this cause was simply venue: Where was the case going to be heard on the merits? – in Harris County or Jefferson County? Had Exxon succeeded at any level in the judicial hierarchy, the most favorable *judgment* which it could have procured was one ordering venue of the cause transferred from Beaumont to Houston. Plaintiff now agrees to such a transfer but, understandably, Exxon is unwilling to accept this Pyrrhic victory when it was so close to the ultimate and definitive solution to the serious constitutional question which it had urged upon the Courts of Texas.

Exxon, contending the case is not moot, would continue its constitutional challenge of *subdivision 27* in

the hope of achieving its avowed goal of having it declared repugnant to the Constitution of the United States. But, such a challenge must await another case and another day for, as Chief Justice Hickman, in *Tigner v. First Nat. Bank of Angleton*, 153 Tex. 69, 264 S.W.2d 85, 88 (1954), quoting from a text, said:

> " 'One of the most firmly established doctrines in the field of constitutional law is to the effect that a court will pass upon the constitutionality of a law only when necessary to the determination upon the merits of the cause under consideration. The constitutionality of a statute will not be considered and determined by the courts as a hypothetical question, because constitutional questions are not to be dealt with abstractly or in the manner of an academic discussion.' "

The same rule is applicable in the federal court system. As was said in *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663, 678 (1962):

> "A federal court cannot 'pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.' Liverpool, N.Y. & P.S.S. Co. v Emigration Comrs. 113 US 33, 39, 28 L ed 899, 901, 5 S Ct 532."

There is no present actual controversy between the parties as to the controlling question before this court – venue of plaintiff's cause of action against Exxon. Thus, we answer the question specifically consigned to this court: The venue issue has become moot. Cf. *Connell v. B. L. McFarland Drilling Co.*, 162 Tex. 345, 347 S.W.2d 565, 567 (1961).

Having determined that the case has become moot while upon appeal, we are now faced with a procedural problem stemming from the inapplicability of the usual rule which is stated in *Freeman v. Burrows*, 141 Tex. 318, 171 S.W.2d 863 (1943): "When a cause becomes moot on appeal, all previous orders and judgments should be set aside and the cause, not merely the appeal, dismissed." (citations omitted) See also, *Texas Foundries, Inc. v. International Moulders & Foundry Worker's Union*, 151 Tex. 239, 248 S.W.2d 460 (1952); *Guajardo v. Alamo Lumber Co.*, 159 Tex. 225, 317 S.W.2d 725 (1958); *Blanton v. City of Houston*, 163 Tex. 224, 353 S.W.2d 412 (1962); *Lund v. Alanis*, 384 S.W.2d 123 (Tex. 1964).

Obviously, our compliance with this generally prevailing rule would deny to Exxon even the limited relief to which it is entitled under the concession of plaintiff which resulted in aborting the appeal. However, in our effort to fashion a remedy to meet this unusual situation, we must bear in mind another equally well-established rule: An errorless judgment may not be reversed in the interest of justice. See, e.g., *City of Houston v. Blackbird*, 394 S.W.2d 159, 165 (Tex. 1965); *Barnum v. Lopez*, 471 S.W.2d 567, 568 (Tex. 1971); *Chevalier v. Lane's, Inc.*, 147 Tex. 106, 213 S.W.2d 530, 535 (1948). And, as we pointed out on original submission of this cause, the trial court committed no error, *under the prevailing law of this state*, when it overruled the plea of privilege. There has been no change in the law since that opinion was handed down.

In order to place our problem in proper perspective, it is well to recapitulate the procedural morass in

which we are now embedded: (1) We have a case which has become moot while upon appeal, at the instance of the appellee and without fault on the part of the appellant; yet, we cannot take the usual steps to dispose of the cause. (2) The judgment of the trial court on the venue issue has now become final and the only relief which the trial court could grant would be the entry of a judgment of dismissal upon plaintiff's motion for leave to take a nonsuit; yet, this would deny plaintiff a trial on the merits. (3) We review an errorless judgment and the usual rules prohibit us from reversing an errorless judgment.

Our research has not disclosed controlling authority which directs the only just result which we may reach in the disposition of this case – its transfer to Harris County for trial on the merits. Under these circumstances, we must attempt to attain the objective of *Rule 1, T.R.C.P.* – "a just, fair, equitable and impartial adjudication of the rights of litigants . . . ."

We can accomplish this, and confer upon Exxon the right to litigate the merits of plaintiff's cause of action in Harris County *only* by exercising jurisdiction to transfer this cause, notwithstanding our determination that the appeal is moot. We do so in the interest of justice upon the basis of plaintiff's concession noted above. Such an order will be entered as the judgment of this Court.*/

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*/ Justice Roberts, dissenting in *Smith v. Allwright*, 321 U.S. 649, 669, 64 S.Ct. 757, 88 L.Ed. 987, 1000 (1944), characterized a judgment of that Court as being of the "same class as a restricted railroad ticket, good for this day and train only." Such comment may very well be addressed to our holding today.

There yet remains the adjudication of costs of court, and we note that the Supreme Court of the United States has already adjudicated costs in that Court – "that Exxon Corporation recover from Jay M. Preston One Hundred and Fifty Dollars ($150) for its costs herein expended." The Clerk of that Court has advised that the costs adjudged against plaintiff "may be collected through the Court of Civil Appeals of Texas, Ninth Supreme Judicial District or direct from opposing counsel or parties." We now assess costs of this venue appeal in all courts, including the Supreme Court of the United States, against the plaintiff. *Rule 448.*

Therefore, pursuant to the prayer of Exxon Corpoartion contained in its plea of privilege, consistent with the concession of the plaintiff, and in the interest of justice, the judgment of the trial court is now REVERSED and the judgment RENDERED transferring this cause to one of the District Courts of Harris County, Texas, for trial upon the merits.

REVERSED and RENDERED.

Opinion delivered
June 13, 1974

Quentin Keith
Associate Justice

Appendix C

COMMERCIAL INSURANCE COMPANY
OF NEWARK, NEW JERSEY,
Appellant,
v.
JOHN Q. ADAMS, Appellee.
No. 14085.
Court of Civil Appeals of Texas.
Houston.
April 4, 1963.
Rehearing Denied April 25, 1963.

COLEMAN, Justice.

This is an appeal from an order of the trial court overruling a plea of privilege. The principal question involved is the constitutionality of Subd. 27, Article 1995, Revised Civil Statutes of Texas.

Appellant is a foreign corporation with its residence and principal place of business in Dallas County, Texas. The corporation is engaged in doing business in Harris County, Texas, and has an agent, a representative and an office in that County. Appellee filed suit in Harris County, Texas and, in a controverting affidavit to appellant's plea of privilege, alleged as exceptions to exclusive venue in the county of one's residence, Subdivisions 5, 23, 27 and 28 of Article 1995, R.C.S.

Appellee failed to introduce evidence to sustain venue in Harris County under Subdivisions 5 and 28. The judgment of the trial court cannot be sustained by reason of the Amendment to the United States Constitution as affording provisions of either of those subdivisions.

[1] Appellant contends that exception 27 of Article 1995, R.C.S., is void and unconstitutional under the

14th Amendment to the United States Constitution as affording a wider venue for actions against foreign corporations than is afforded against domestic corporations under Section 23 of Article 1995, R.C.S. Prior to 1943 the provisions of our statutes relating to venue for foreign corporations were substantially the same as for domestic corporations. Acts 1874, 14th Legislature, G.L., Vol. 8, Ch. 34, p. 32; subd. 21, Art. 1198, Rev.Civ. Statutes of Texas, 1879; Acts of 19th Legislature, 1885, G.L., Vol. 9, p. 699; Fireman's Fund Insurance Company v. McDaniel, Tex.Civ.App., 327 S.W.2d 358, Grayburg Oil Co. v. Powell, 118 Tex. 354, 15 S.W.2d 542.

In 1943, Subd. 23 of Art. 1995, R.C.S. was amended and now provides:

"Corporations and Associations. — Suits against a private corporation, association, or joint stock company may be brought in the county in which its principal office is situated; or in the county in which the cause of action or part thereof arose; or in the county in which the plaintiff resided at the time the cause of action or part thereof arose, provided such corporation, association or company has an agency or representative in such county; or, if the corporation, association, or joint stock company had no agency or representative in the county in which the plaintiff resided at the time the cause of action or part thereof arose, then suit may be brought in the county nearest that in which plaintiff resided at said time in which the corporation, association or joint stock company then had an agency or representative. Suits against a railroad corporation, or against any assignee, trustee or receiver operating its railway, may also be brought in any count through or into which the railroad of such corporation extends or is operated.

Suits against receivers of persons and corporations may also be brought as otherwise provided by law."

Subdivision 27 reads as follows:

"Foreign corporation. — Foreign corporations, private or public, joint stock companies or associations, not incorporated by the laws of this State, and doing business within this State, may be sued in any county where the cause of action or a part thereof accrued, or in any county where such company may have an agency or representative, or in the county in which the principal office of such company may be situated; or, when the defendant corporation has no agent or representative in this State, then in the county where the plaintiffs or either of them, reside."

In Fireman's Fund Insurance Company v. McDaniel, supra, the Court of Civil Appeals at Beaumont in a carefully written opinion reviewing the applicable decisions held:

> "We first note some of the inequalities in the administration of the two venue exceptions even where the terms are similar. As was held in Victoria Bank & Trust Co. v. Monteith, 138 Tex. 216, 158 S.W.2d 63, and Rogers v. Fort Worth Poultry & Egg Co., Tex. Civ.App., 185 S.W.2d 165, for a plaintiff to maintain venue against a defendant domestic corporation outside of the county where its principal office is located under Exception 23, he must prove a cause of action by the preponderance of the evidence on the venue hearing. It is not sufficient under that exception to make mere prima facie proof of a cause of action. But under the part of Exception 27 here referred to, he would not need to make any proof whatever of any cause of

action at the venue hearing. Southwestern Greyhound Lines v. Day, Tex.Civ.App., 238 S.W.2d 258. A foreign corporation may be sued in any county where it has an agency or representative, without reference to the plaintiff's county of residence, and without reference to whether the suit is substantial enough that a cause of action could actually be proved upon the venue hearing.

"* * * The Saunders decision, Power Mfg. Co. v. Saunders, 1927, 274 U.S. 490, 47 S.Ct. 678, 679, 71 L.Ed. 1165, appears to be a culmination of a series of cases since the Greene case (Southern R. Co. v. Greene, 216 U.S. 400, 30 S.Ct. 287, 54 L.Ed. 536) extending the equal protection clause to foreign corporations and we believe it to be decisive of the constitutional question before us.

* * * *

"We accordingly hold Sub. 27 of Art. 1995, Vernon's Ann.Civil Statutes of Texas, as amended, to be unconstitutional under the 14th Amendment to the United States Constitution as it relates to the venue of suits against foreign corporations of Fireman's Funds status to the extent that it conflicts with the provisions of Sub. 23 of Art. 1995, as amended, by Acts 1943, 48 Leg."

[2] This decision was cited as controlling by the Court of Civil Appeals at Eastland in Maryland Casualty Company v. Frank M. Torrez, 359 S. W.2d 559. An application for a writ of error in this case was dismissed by the Supreme Court of Texas for want of jurisdiction by written opinion, in which the Court pointed out: "We should not be understood as implying that said subdivision 27 is unconstitutional or that the contrary is true." Torrez v. Maryland Casualty Co., 363 S.W.2d 235 (Tex.Sup.). This Court, therefore,

must determine the question of the constitutionality of Subdivision 27 after consideration of all the pertinent authorities.

In 1904 the Supreme Court of the United States decided the case of Cincinnati Street Railway Co. v. Snell, 193 U.S. 30, 24 S.Ct. 319, 48 L.Ed. 604. An Ohio statute provided:

> "When a corporation having more than fifty stockholders is a party in an action pending in a county in which the corporation keeps its principal office, or transacts its principal business, if the opposite party make affidavit that he cannot, as he believes, have a fair and impartial trial in that county, and his application is sustained by the several affidavits of five credible persons residing in such county, the court shall change the venue to the adjoining county most convenient for both parties."

There is no statute giving the corporation the right to a change of venue. It was contended that this constituted discrimination denying equal protection of the law in violation of the 14th Amendment to the Constitution of the United States. The Court upheld the constitutionality of the act, saying:

> "The proposition to which the case reduces itself is therefore this: That although the protection of equal laws equally administered has been enjoyed, nevertheless there has been a denial of the equal protection of the law within the purview of the 14th Amendment, only because the state has allowed one person to seek one forum and has not allowed another person, asserted to be in the same class, to seek the same forum, although as to both persons the law has afforded a forum in which the

same and equal laws are applicable and administered. But it is fundamental rights which the 14th Amendment, safeguards, and not the mere forum which a state may see proper to designate for the enforcement and protection of such rights. Given, therefore, a condition where fundamental rights are equally protected and preserved, it is impossible to say that the rights which are thus protected and preserved have been denied because the state has deemed best to provide for a trial in one forum or another. It is not, under any view, the mere tribunal into which a person is authorized to proceed by a state which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the state has provided equal laws prevail."

However, in Power Mfg. Co. v. Saunders, 274 U.S. 490, 47 S.Ct. 678, 71 L.Ed. 1165 (1927), the Supreme Court declared unconstitutional a statute of the State of Arkansas allowing a suit for personal injuries against a foreign corporation to be brought in any county of the state, where actions of the same character, if against a domestic corporation, had to be brought in a county where it had a place of business or in which its chief officer resided, and, if against a natural person, in a county where he resided or could be found. The basis for the decision is found in this quotation:

> "The clause in the Fourteenth Amendment forbidding a state to deny to any person within its jurisdiction the equal protection of the laws is a pledge of the protection of equal laws (Truax v. Corrigan, 257 U.S. 312, 333, 42 S.Ct. 124, 66 L.Ed. 254, 27 A.L.R. 375; Atchison, Topeka & Santa Fe Ry. Co. v. Vosburg, 238 U.S. 56, 59, 35 S.Ct. 675, 59 L.Ed. 1199, L.R.A. 1915E 953), and extends as

well to corporate as to natural persons (Smyth v. Ames, 169 U.S. 466, 522, 18 S.Ct. 418, 42 L.Ed. 819; Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, 165 U.S. 150, 154, 17 S.Ct. 255, 41 L.Ed. 666; Santa Clara County v. Southern Pacific R.R. Co. 118 US. 394, 396, 6 S.Ct. 1132, 30 L.Ed. 118). It does not prevent a state from adjusting its legislation to differences in situation or forbid classification in that connection but it does require that the classification be not arbitrary, but based on a real and substantial difference, having a reasonable relation to the subject of the particular legislation. Truax v. Corrigan, supra, page 337 (42 S.Ct. 131); Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, supra, 155 (17 S.Ct. 256); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78, 31 S.Ct. 337, 55 L.E.. 369, Ann.Cas. 1912C, 160; Ft Smith Light & Power Co. v. Board of Improvement (May 16, 1927) 274 U.S. 387, 47 S.Ct. 595, 71 L.Ed. 1112.

> "No doubt there are subjects as to which corporations admissibly may be classified separately from individuals and accorded different treatment, and also subjects as to which foreign corporations may be classified separately from both individuals and domestic corporations and dealt with differently. But there are other subjects as to which such a course is not admissible; the distinguishing principle being that classification must rest on differences pertinent to the subject in respect of which the classification is made.
>
> "Here the separate classification of foreign corporations is in respect of the venue or place of bringing transitory actions. *The statutes mean foreign corporations doing business within the state by her permission, and therefore having a fixed place of business therein and a resident agent*

on whom process may be served. We speak only of them. So far as their situation has any pertinence to the venue of transitory actions, it is not distinguishable from that of domestic corporations and individuals. Certainly there is no substantial difference. The opinion of the state court does not point to any relevant distinction, nor have counsel suggested any. Of course the restricted venue as to domestic corporations and individuals is prompted by considerations of convenience and economy; but these considerations have equal application to foreign corporations. So far as the plaintiffs in such actions are affected, it is apparent that there is no more reason for a statewide venue when the action is against a foreign corporation than when it is against a domestic corporation or a natural person. So we conclude that the special classification and discriminatory treatment of foreign corporations are without reasonable basis and essentially arbitrary." (Emphasis added)

Justices Holmes and Brandeis dissented.

In Bain Peanut Co. of Texas et al v. Pinson et al, 282 U.S. 499, 51 S.Ct. 228, 75 L.Ed. 482 (1931), opinion by Mr. Justice Holmes, the Court upheld the constitutionality of Subd. 23, Art. 1995, R.C.S. of Texas, in a case where the question was raised as to whether the statute allowing suits against private corporations to be brought in any county in which the cause of action arose was valid under the 14th Amendment to the Constitution of the United States when unincorporated individuals were not subject to such suits outside the county of their residence. The Court, relying on Cincinnati Street Railway v. Snell, supra, said:

"In deciding whether a corporation is denied the

equal protection of the laws when its creator establishes a more extensive venue for actions against it than are fixed for private citizens we have to consider not a geometrical equation between a corporation and a man but whether the difference does injustice to the class generally, even though it bear hard in some particular case, which is not alleged or proved here. Louisville & Nashville R. Co. v. Barger Asphalt Paving Co., 197 U.S. 430, 434, 25 S.Ct. 466, 49 L.Ed. 819; Pastone v. Pennsylvania, 232 U.S. 138, 144, 34 S.Ct. 281, 58 L.Ed. 539. This it is for the corporation to make out. The range of the State's discretion is large. * * * The question seems to be answered by Cincinnati Street Ry. Co. v. Snell, 193 U.S. 30, 36, 37, 24 S.Ct. 319, 48 L.Ed. 604, which lays down that if the protection of fundamental rights by equal laws equally administered is enjoyed, the Constitution does not forbid allowing one person to seek a forum from which another in the same class is excluded. But without asserting a universal proposition it is obvious that there is likely to be such a difference between the business done by a corporation and that done by a private person that the State well may take it into account when it permits a corporation to be formed."

In Metropolitan Casualty Ins. Co. of New York v. Brownell, 294 U.S. 580, 55 S.Ct. 538, 79 L.Ed. 1070, the Court considered an Indiana statute invalidating provisions in insurance policies issued by foreign insurance companies limiting time for suits thereon to less than three years. There was no similar legislation applicable to domestic insurance companies. The Supreme Court held that the legislation did not infringe the 14th Amendment, saying:

"The equal protection clause does not prohibit

legislative classification and the imposition of statutory restraints on one class which are not imposed on another. But this Court has said that not every legislative discrimination between foreign and domestic corporations is permissible merely because they differ, and that with respect to some subjects of legislation the differences between them may afford no reasonable basis for the imposition of a statutory restriction upon foreign corporations, not applied to domestic corporations. The ultimate test of validity is not whether foreign corporations differ from domestic, but whether the differences between them are pertinent to the subject with respect to which the classification is made. Power Mfg. Co. v. Saunders, supra, 274 U.S. 494, 47 S.Ct. 678, 71 L.Ed. 1165. If those differences have any rational relationship to the legislative command, the discrimination is not forbidden. Washington ex rel. Bond & Goodwin & Tucker, Inc., v. Superior Court, 289 U.S. 361, 366, 53 S.Ct. 624, 77 L.Ed. 1256, 89 A.L.R. 653, National Union Fire Insurance Co. v. Wanberg, 260 U.S. 71, 75, 43 S.Ct. 32, 67 L.Ed. 136. See State of Ohio ex rel. Clarke v. Deckebach, 274 U.S. 392, 396, 47 S.Ct. 630, 71 L.Ed. 1115.

* * * * *

"It is a salutary principle of judicial decision, long emphasized and followed by this Court, that the burden of establishing the unconstitutionality of a statute rests on him who assails it, and that courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators. A statutory discrimination will not be set aside as

> the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it. Rast v. Van Deman & Lewis Co., 240 U.S. 342, 357, 36 S.Ct. 370, 60 L.Ed. 679, L.R.A. 1917A, 421, Ann. Cas. 1917B, 455; State Board of Tax Commissioners v. Jackson, 283 U.S. 527, 537, 51 S.Ct. 540, 75 L.Ed. 1248, 73 A.L.R. 1464."

Four Justices dissented, citing, among other cases, Power Manufacturing Company v. Saunders, supra, for the proposition that the statute contravened the equal protection clause of the 14th Amendment.

In Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed. 2d 480, the Court refused to strike down legislation of the State of Ohio taxing merchandise belonging to a domestic corporation held in storage warehouses for storage only, where merchandise belonging to non-residents similarly held was exempted from the tax. In discussing whether the discrimination involved in this legislation violated the Equal Protection Clause of the 14th Amendment, the Court said:

> "But there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.' * * * 'If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.' * * * That a statute may discriminate in favor of a certain class does not render it arbitrary if the discrim-

ination is founded upon a reasonable distinction, or difference in a state policy. * * *

"* * * Similarly, it has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it. * * *"

[3] From these cases it is evident that not all discrimination is prohibited by the Equal Protection Clause of the 14th Amendment, and that a determination of whether a statute which discriminates between classes is unconstitutional requires the consideration of: (1) whether the difference does injustice to the class generally in that the same and equal laws are not applicable and administered in the forum provided; and (2) whether the difference is pertinent to the subject with respect to which the classification is made; and (3) whether the discrimination is founded upon any reasonable distinction or difference in state policy.

That provision of Subd. 27 allowing venue against a foreign corporation in any county where it has an agency or representative is not comparable to that provision of Subd. 23 permitting the plaintiff to sue a domestic corporation in the county of his residence at the time the cause of action accrued if the corporation maintained an agency or representative there, or, if no agency or representative is found in such county, then in the nearest county where such a representative or agency can be found. This particular exception was no doubt inserted to permit a plaintiff to have the benefit of a trial in or near his home county, and appears to be fair and reasonable since the requirement that the defendant maintain an agency or representative in the

county insures that the county of trial is one where the corporation is known and with which the corporation is familiar. The foreign corporation as a plaintiff receives the benefit of the provision and therefore suffers no discrimination.

The difference, which constitutes discrimination, lies in the absence of a provision in Subd. 23 permitting suit against a domestic corporation in certain counties where it maintains an agency or representative, while Subd. 27 allows suit against foreign corporations in all such counties.

[4] There is no contention that the same and equal laws are not applicable and administered in all counties of Texas. Subdivision 27 applies to all foreign corporations. It is a matter of common knowledge that many foreign corporations do business in this state without taking advantage of the laws of this state authorizing them to do business in Texas and subjecting them to regulation. It would be difficult, if not impossible, for a plaintiff to ascertain the principal office of a foreign corporation not authorized to do business in this state. A foreign corporation qualified to do business in this state may designate as its principal office a county remote from the population centers of the state, in which it conducts little or no business since its principal office, in fact, ordinarily will be maintained in the state of incorporation. A domestic corporation would be likely to find such a procedure uneconomical. Competitive factors would dictate that its principal office be located where it intends to conduct its business. Thus the foreign corporation is favored over the domestic concern when it is permitted to choose any city as its principal place of business.

There is little doubt that the difficulty of securing service on foreign corporations was a factor inducing the legislature to provide a wide venue for actions against them. The caption of Senate Bill No. 126, enacted into law by the 19th Legislature and approved by the Governor on March 31, 1885, provided:

> "An act prescribing and fixing the venue of suits against foreign corporations, joint stock companies or associations, or acting corporations or associations, doing business within this state, and to provide the mode of serving process on such corporations or associations."

The act consisted of two sections. The first was substantially the same as our present Subdivision 27 and the second provided the method of obtaining service, including service of process on "any local agent within this state."

The degree of effective control which the state may exercise over domestic corporations as opposed to foreign corporations in general justifies the classification adopted by the state legislature. The state policy in this respect is not so arbitrary as to be unconstitutional. As regards foreign corporations submitting to a certain degree of control by qualifying to do business in the state, the justification is less evident, but nevertheless the state is not able to give its citizens the same assurance of effective redress for injuries committed by foreign corporations as it can in the case of domestic corporations. The quotation from Justice Holmes' opinion in the Bain Peanut case, supra, is apt in this connection. In that opinion he also pointed out: "The interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a

little play in its joints." Bain Peanut Co. of Texas v. Pinson, supra.

[5, 6] It could well be that the legislature had in mind spreading litigation involving foreign corporations among the various courts of the state in order to avoid the possibility of increasing the congested condition of the dockets of the metropolitan courts. Other possibilities could be explored, but, as was pointed out by the Supreme Court of the United States in Metropolitan Casualty Insurance Company of New York v. Brownell, supra, "A statutory discrimination will not be set aside * * * if any state of facts reasonably may be conceived to justify it." The burden of proving unconstitutionality of this statute rests on appellant more heavily in view of the fact that the act attacked was undoubtedly constitutional when enacted and the question of its legality at this time arises, not by reason of a change in its provisions, but by reason of the enactment of a statute amending Section 23, and not because discriminatory burdens have been placed on foreign corporations, but because the same burden has been removed from domestic corporations.

The highest courts of several states have considered similar statutes and have upheld them as being valid. Lloyd Adams, Inc. v. Liberty Mutual Insurance Co., 190 Ga. 633, 10 S.E.2d 46 (1940); Conner v. Willet, 265 Ala. 319, 91 So.2d 225 (1956); Long v. General Petroleum Co. of California, 11 Cal.App.2d 708, 54 P.2d 1147 (1936); Wilson and Company, Inc. v. Hickey, 186 Okl. 324, 97 P.2d 564 (1939).

In Fireman's Fund Insurance Company v. McDaniel, supra, the Court of Civil Appeals said: "In view of the holding in the Saunders case, however, we believe that

to point to the discrimination effected by Subd. 27 of our statute in the circumstances, is to prove it unreasonable and arbitrary as a matter of law." In spite of our great respect for the ability and learning of that court and of the Eastland Court of Civil Appeals, we are unable to agree. In the Saunders case the statute under consideration placed venue in any county in the state without regard to whether the corporation maintained an agent or representative there. In addition, as construed by the court, the statute applied only to foreign corporations who had a permit to do business in the state. Under such circumstances the actual decision in the Saunders case would not be controlling as to the legality of the Texas law. The holding of the Saunders case has been weakened by the decision of the Bain Peanut case reaffirming the Cincinnati Street Railway case, and by the subsequent decisions of the United States Supreme Court previously cited.

Appellee proved that appellant was a foreign corporation; that it was doing business in Texas; and that it had an agent and representative in Harris County, Texas. These facts appearing, the trial court was correct in sustaining venue in Harris County, Texas. We, therefore, find it unnecessary to determine whether exception 23 applies to foreign corporations or whether the facts proved would sustain venue in Harris County under such Subdivision.

The judgment of the trial court is affirmed.

COMMERCIAL INSURANCE COMPANY OF NEWARK, NEW JERSEY, Petitioner,

v.

JOHN Q. ADAMS, Respondent.

No. A-9630.

Supreme Court of Texas.

July 17, 1963.

Rehearing Denied July 31, 1963.

PER CURIAM.

The Houston Court of Civil Appeals in this case has held that exception 27 of Art. 1995, Vernon's Ann.Civ. Stat., is not void and unconstitutional under the 14th Amendment to the United States Constitution as affording a wider venue for action against foreign corporations than is afforded against domestic corporations under Section 23 of the same article. 366 S.W.2d 801. This holding is in conflict with the holding of the Beaumont Court of Civil Appeals in Fireman's Fund Insurance Co. v. McDaniel et al., Tex.Civ.App., 327 S.W.2d 358, and with that of the Eastland Court of Civil Appeals in Maryland Casualty Co. v. Torrez, Tex.Civ.App., 359 S.W.2d 559.[1]

We are in agreement with the decision of the Houston Court of Civil Appeals in this case. The writ of error is accordingly refused. Rule 483, Rules of Civil Procedure.

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[1] Writ of error dismissed for want of jurisdiction. Torrez v. Maryland Casualty Company, Tex., 363 S.W.2d 235.

Supreme Court, U. S.
FILED
DEC 5 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1481

AMERICAN MOTORISTS INSURANCE COMPANY,

Appellant

v.

VIRGIL B. STARNES,

Appellee

ON APPEAL FROM THE COURT OF CIVIL APPEALS
OF TEXAS, TENTH SUPREME JUDICIAL DISTRICT

APPENDIX

APPEAL DOCKETED MAY 27, 1975
PROBABLE JURISDICTION NOTED OCTOBER 6, 1975

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 74-1481

AMERICAN MOTORISTS INSURANCE COMPANY,

Appellant,

V.

VIRGIL B. STARNES,

Appellee.

ON APPEAL FROM THE COURT OF CIVIL
APPEALS OF TEXAS
TENTH SUPREME JUDICIAL DISTRICT

E R R A T A T O A P P E N D I X

In the Index:

"Plaintiff's Original Petition" at "Page 1" should be "Page 2".

"Appeal Docketed" at "Page --" should be "Page 19".

Joel W. Westbrook
ATTORNEY FOR APPELLANT

TRUEHEART, McMILLAN, WESTBROOK,
HOFFMAN & RUSSELL
1910 National Bank of Commerce Bldg.
San Antonio, Texas 78205
(512) 226-6291

No. 73-1944-3

IN THE DISTRICT COURT
74TH JUDICIAL DISTRICT
MCLENNAN COUNTY, TEXAS

VIRGIL B. STARNES

v.

AMERICAN MOTORISTS INSURANCE COMPANY

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Virgil B. Starnes hereinafter referred to as plaintiff, complaining of American Motorists Insurance Company, hereinafter referred to as defendant, and pleads as follows:

I.

The defendant is a liability insurance company incorporated under the laws of the State of Illinois with its registered agent for service in Texas being Clay Cotten, Austin, Travis County, Texas.

II.

Heretofore, the defendant issued its policy of liability insurance to plaintiff Virgil B. Starnes, being Policy No. JA63820, which policy insured plaintiff for damages resulting from an accident with an uninsured motorist and said policy specifically provided that the defendant would "pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily in-

jury, sickness or disease, including death resulting therefrom, hereinafter called 'bodily injury,' sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile; . . .".

I hereby certify that this notice was served on me by the Sheriff of Travis County, Texas, at 10:15 AM on October 10, 1973.

/S/ CLAY COTTEN
Commissioner of Insurance
State of Texas

III.

That thereafter, on May 29, 1971, on which date said policy of insurance was in full force and effect, Virgil B. Starnes was driving said automobile when it was involved in an accident with an automobile being driven by Herschel N. Burk. Said accident and collision and the resulting bodily injury suffered by Virgil B. Starnes was proximately caused by the following acts or omissions of Herschel N. Burk, each of which constituted negligence:

(a) Operating his automobile at an excessive rate of speed;

(b) Failing to keep a proper lookout.

IV.

That as a proximate result of said collision, Virgil B. Starnes, plaintiff, suffered severe injuries to his body to his damage in the total amount of $10,000.00.

V.

That at the time such accident and collision occurred, Herschel N. Burk was an uninsured motorist as defined under said policy of insurance.

VI.

That all conditions precedent to suit being filed upon said policy have been performed by plaintiff or have otherwise occured.

WHEREFORE, PLAINTIFF PRAYS that defendant be served with citation and that upon final hearing hereof, plaintiff recover against defendant in the amount of $10,000.00, for costs of court and any other relief to which plaintiff may be entitled.

DUNNAM, DUNNAM &
DUNNAM
1000 North 25th Street
Post Office Box 3276
Waco, Texas 76707
By FRED HORNER
Attorneys for Plaintiff

No. 73-1944-3

IN THE DISTRICT COURT
74TH JUDICIAL DISTRICT
MCLENNAN COUNTY, TEXAS

VIRGIL B. STARNES

v.

AMERICAN MOTORISTS INSURANCE COMPANY

DEFENDANT'S ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES AMERICAN MOTORISTS INSURANCE COMPANY, Defendant in the above entitled and numbered

cause, and expressly subject to its Plea of Privilege heretofore filed and without waiving the same, files this, its Original Answer, and by way of such Answer would show unto the Court the following:

1.

This cause of action is barred under the provisions of *Article 5526, V.A.T.S.*, the same having not been filed until the 27th day of September, 1973, more than two years since the cause of action accrued.

2.

Pursuant to *Rule 92* of the *Texas Rules of Civil Procedure*, the Defendant, American Motorists Insurance Company, denies each and every, all and singular, the allegations of Plaintiff's Original Petition, and requires the Plaintiff to prove the same by a preponderance of the credible evidence, as in law he is required to do.

WHEREFORE, PREMISES CONSIDERED, the Defendant prays the Court that judgment be entered that Plaintiff herein take nothing, that Defendant go hence without day and with its costs in this behalf expended, and for such other and further relief to which it may be justly entitled.

SHEEHY, CURETON,
WESTBROOK, LOVELACE
& NIELSEN
By JOEL W. WESTBROOK
1200 American-Amicable
Building
Waco, Texas 76701
Attorneys for Defendant
AMERICAN MOTORISTS
INSURANCE COMPANY

DEFENDANT DEMANDS A TRIAL BY JURY

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Defendant's Original Answer has been forwarded by regular United States mail, postage prepaid, to FRED HORNER, ESQUIRE, at the offices of DUNNAM, DUNNAM & DUNNAM, 1000 North 25th Street, P. O. Box 3276, Waco, Texas 76707, attorney for Plaintiff, on this 30th day of October, 1973.

/s/ JOEL W. WESTBROOK

No. 73-1944-3

IN THE DISTRICT COURT
74TH JUDICIAL DISTRICT
MCLENNAN COUNTY, TEXAS

VIRGIL B. STARNES

v.

AMERICAN MOTORISTS INSURANCE COMPANY

DEFENDANT'S PLEA OF PRIVILEGE

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES AMERICAN MOTORISTS INSURANCE COMPANY, Defendant in the above entitled and numbered cause, having been heretofore served with citation to appear herein, and files this, its Plea of Privilege, showing to the Court as grounds therefor the following:

1.

This Defendant, the party claiming such privilege, was

not at the institution of such suit, nor at the time of the service of process therein, nor is it at the time of the filing of such Plea, a resident of McLennan County, Texas, the county in which suit was instituted.

2.

At the institution of such suit and at the time of service of process therein, the residence of this Defendant was, and, at the time of filing this Plea, it is Dallas County, Texas, and at such times the post office address of its attorney, JOEL W. WESTBROOK, ESQUIRE, was and is 1200 American-Amicable Building, Waco, Texas 76701.

3.

No exception to exclusive venue in the county of one's residence, provided by law, exists in said cause.

WHEREFORE, PREMISES CONSIDERED, this Defendant prays the Court to sustain this Plea of Privilege, and that said cause be transferred to Dallas County, Texas.

SHEEHY, CURETON,
WESTBROOK, LOVELACE
& NIELSEN
By JOEL W. WESTBROOK
1200 American-Amicable
Building
Waco, Texas 76701
Attorneys for Defendant

THE STATE OF TEXAS :
COUNTY OF McLENNAN:

BEFORE ME, the undersigned authority, on this day personally appeared JOEL W. WESTBROOK, who, on oath

stated that he is the attorney for the Defendant, AMERICAN MOTORISTS INSURANCE COMPANY, in the above mentioned cause, that he is authorized to verify the foregoing Plea of Privilege, that he is cognizant of the facts set forth therein, and that the foregoing Plea and every statement, allegation, and denial thereof are true.

/s/ JOEL W. WESTBROOK
Joel W. Westbrook

SWORN TO AND SUBSCRIBED BEFORE ME, by the said Joel W. Westbrook, this 30th day of October, 1973, to certify which witness my hand and seal of office.

/s/ HELEN M. CROSS
Notary Public in and for
McLennan County, Texas

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Defendant's Plea of Privilege has ben forwarded by regular United States mail, postage prepaid, to FRED HORNER, ESQUIRE, at the offices of Dunnam, Dunnam & Dunnam, 1000 North 25th Street, P. O. Box 3276, Waco, Texas 76707, attorney for Plaintiff, on this 30th day of October, 1973.

/s/ JOEL W. WESTBROOK
Joel W. Westbrook

No. 73-1944-3

IN THE DISTRICT COURT
74TH JUDICIAL DISTRICT
MCLENNAN COUNTY, TEXAS

VIRGIL B. STARNES

v.

AMERICAN MOTORISTS INSURANCE COMPANY

CONTROVERTING PLEA

TO THE HONORABLE JUDGE OF SAID COURT:

Virgil B. Starnes, plaintiff in the above case, files this his plea controverting the plea of privilege filed herein by defendant, American Motorists Insurance Company and show to the Court that this Court has venue of this cause of action and of the person of said defendant upon the following grounds:

1. Plaintiff adopts and incorporates in this plea each and every allegation in his Original Petition on file herein and makes the same a part hereof for all purposes the same as if set out herein in haec verba.

2. Each and every allegation in plaintiff's original petition on file herein is true.

3. This Court has venue of this cause of action and the person of defendant American Motorists Insurance Company, under and by virtue of Sections 23 and 27, Article 1995, Revised Civil Statutes of the State of Texas, in that it is a private corporation and plaintiff's cause of action or part thereof arose in McLennan, County, Texas, and McLennan County is the county in which plaintiff resided at the time the cause of action or part thereof arose and said defen-

dant has an agency or representative in McLennan County, Texas, and that the defendant is a foreign corporation organized under the laws of Illinois and has an agency and representative in McLennan County, the county where this suit is filed.

WHEREFORE, plaintiff prays that the plea of privilege filed herein by defendant, American Motorists Insurance Company, be in all things overruled and that they recover their costs herein.

DUNNAM, DUNNAM &
DUNNAM
1000 North 25th Street
Post Office Box 3276
Waco, Texas 76707
By FRED HORNER
Fred Horner

I, Fred Horner, attorney for plaintiff in the above cause, having been duly sworn upon oath states that each and every fact set forth in the above controverting plea and in the original petition on file herein is true.

/s/ FRED HORNER
Fred Horner

SWORN TO AND SUBSCRIBED BEFORE ME BY THE SAID Fred Horner on this the 6th day of November, A.D. 1973.

/s/ BRITA BAKER
Notary Public in and for
McLennan County, Texas

The above controverting plea was duly filed this 8th day of November, 1973, and a hearing set on said plea of privilege and controverting plea is at 2:00 P.M. on the 21st day of November, 1973.

/s/ DERWOOD JOHNSON
Judge Presiding

No. 73-1944-3

IN THE DISTRICT COURT
74TH JUDICIAL DISTRICT
MCLENNAN COUNTY, TEXAS

VIRGIL B. STARNES

v.

AMERICAN MOTORISTS INSURANCE COMPANY

STIPULATIONS

TO THE HONORABLE JUDGE OF SAID COURT:

For the purpose of the hearing upon venue the parties hereto hereby stipulate and agree upon the following facts:

1. Prior to May 29, 1971 and at all times subsequent thereto, American Motorists Insurance Company was and is a foreign corporation, organized under the laws of the State of Illinois, and was and is authorized to do business in the State of Texas.

2. American Motorists Insurance Company does presently transact business in the State of Texas and has transacted business in the State of Texas prior to May 29, 1971 and continually transacted business in the State of Texas since that date.

3. That on May 29, 1971, and at all times subsequent thereto, Bill Bailey of Bill Bailey Insurance, located in Waco, McLennan County, Texas, and then owned by Bill Bailey, was duly licensed under the laws of the State of Texas as an insurance recording agent and authorized to transact business as a "recording insurance agency" as evidenced by a true and correct copy of License No. dated issued by the Texas State Board of Insurance. Further, said Bill Bailey d/b/a Bill Bailey Insurance, on May 29, 1971,

was a recording agent for American Motorists Insurance Company, the defendant herein, as evidenced by the Notice of Appointment of Recording Agent dated , said Notice of Appointment of Recording Agent having been duly filed with the Commissioner of Insurance and never having been revoked or otherwise terminated to date.

4. That the said Bill Bailey, d/b/a Bill Bailey Insurance, transacted business in McLennan County, Texas continually as a duly licensed insurance recording agent, as said term is defined in Article 21.14 of the Texas Insurance Code, V.A.T.S., for American Motorists Insurance Company, from May 29, 1971 to date.

5. That as local recording agent for the defendant, American Motorists Insurance Company, Bill Bailey transacting business as Bill Bailey Insurance, has the power and authority to contractually bind American Motorists Insurance Company on policies of automobile liability insurance and further, has the power and authority to accept and collect monies owed to the defendant, American Motorists Insurance Company.

6. As local recording agent for American Motorists Insurance Company, Bill Bailey, transacting business as Bill Bailey Insurance has in the past and at the present time actively solicits business for the defendant, American Motorists Insurance Company.

7. The policy of insurance upon which plaintiff relies in this cause of action was not anywise procured through Bill Bailey or Bill Bailey Insurance.

The above facts are hereby stipulated and agreed to by all parties for the purpose of determining venue and may be used in evidence at the hearing on the plea of privilege duly filed by the defendant and duly controverted by the plaintiff.

AGREED TO:

/s/ FRED HORNER

FRED HORNER, Attorney for Plaintiff,
Virgil B. Starnes

/s/ JOEL WESTBROOK

JOEL WESTBROOK, Attorney for Defendant,
American Motorists
Insurance Company

IN THE DISTRICT COURT OF MCLENNAN COUNTY, TEXAS
74TH JUDICIAL DISTRICT

* * *

VIRGIL B. STARNES
Plaintiff

v.

AMERICAN MOTORISTS INSURANCE COMPANY
Defendant

Cause Number 73-1944-3

APPEARANCES:

For the Plaintiff:

DUNNAM, DUNNAM & DUNNAM
1000 North 25th Street
Waco, Texas 76710
By: Honorable Fred Horner

For the Defendant:

SHEEHY, LOVELACE & MAYFIELD
Alico Center
Waco, Texas 76701
By: Honorable Joel Westbrook

PLEA OF PRIVILEGE HEARING

* * *

BE IT REMEMBERED that upon the Plea of Privilege Hearing in the above entitled and numbered cause, which was commenced on June 28, 1974, in the 74th Judicial District Court of McLennan County, Texas, before the Honorable Derwood Johnson, Judge Presiding, the following evidence was adduced and other proceedings had:

* * *

THE COURT: Proceed.

Mr. Horner: Judge, this is a Plea of Privilege and Joel and I have entered into a stipulation which will be filed and we have one additional stipulation which I would like to dictate to Lillian. That at the time of the collision which is the basis of this lawsuit American Motorists Insurance Company had in full force and effect a valid policy of liability insurance which included uninsured motorist coverage on the automobile operated by the Plaintiff, Virgil B. Starnes. Is that correct, Joel?

Mr. Westbrook: Defendant agrees to that for the purposes of this hearing, Your Honor.

Mr. Horner: It is the Plaintiff's position in this case that this Court has jurisdiction in this cause by virtue of Section 27 of Article 1995 in that those further stipulations which have been entered into between the parties. The Defendant, American Motorists Insurance Company, is a foreign corporation organized under the laws of the State of Illinois. That it was a foreign corporation at the time of the accident which is the basis of this lawsuit. At that time and all times subsequent thereto they had an agent and representative here in McLennan County, that agent and representative

being Bill Bailey Insurance Company. It is further stipulated that Bill Bailey Insurance Company at the time of the collision and at all times subsequent thereto was duly appointed as a local recording agent for American Motorists Insurance Company as that term is defined in the Insurance Code. And it's our position that under the case of Hanover Insurance Company versus Sanford that this satisfies the elements of proof to bring this case within the exception of Section 27.

Mr. Westbrook: What's the citation on that?

Mr. Horner: It's 457 Southwest 2nd 115.

Mr. Westbrook: What's the writ history?

Mr. Horner: Joel, I'm not sure . . .

Mr. Westbrook: If it please the Court, Your Honor, could we have the jacket that has the – it should be on your desk?

The Court: Here it is.

Mr. Westbrook: May we inquire if Plaintiff has any evidence other than that contained in the stipulation they have offered?

Mr. Horner: Not at this time.

Mr. Westbrook: We would ask the Court to take judicial notice of the Defendant's Plea of Privilege filed herein on October 30th, 1973 as well as the Controverting Plea filed November 8, 1973 and in aid of the Court's judicial notice, would ask the Court Reporter to mark with respect to Defendant's Exhibits A and B. We ask the Court to take judicial notice of these. Our position, Your Honor, is that the Controverting Plea, where it takes to rest venue under Sections 23 and 27 and irrespectively, the cases hold Section 27 to be unconstitutional; that it would rest in any event, that the same principles apply as to 23 and 27 and indeed does rest under 23, if at all. We believe that the Plea of Privilege must

be sustained under Lloyds Casualty Insurer versus McCrary, Supreme Court of Texas 1950, 229 Southwestern 2nd, 605 in which rap (sic)[1] by way of dictum stated that "All parties concede that the burden rested on the plaintiff and the interveners to show a cause of action against the insurer to maintain venue in the county where the suit was filed, under Subdivision 23 of Article 1995." Cited Supreme Court Case of "Victoria Bank & Trust Company vs. Monteith." The Court went on to find that a cause of action was indeed shown there. Among the numerous cases (sic)[2] Lloyd's is Ferris Super Market versus Jernigan, Amarillo Court June 8, 1964, no writ history, where in a slip and fall case the District Court overruled the Plea of Privilege, the store operator appealed and Judge Denton, speaking for the Court of Civil Appeals, held that there was no evidence that could sustain the cause of action because of the failure to show that the agent which was identified as causing the slip, had been placed there by the Defendant or that he knew of its presence at the time he slipped on it and recognizing the principle in Lloyds and citing that and other cases, said that it was encumbent upon the Plaintiff in proving cause of action and it hadn't done so and, therefore, the order was reversed and the Plea was sustained. That's all.

Mr. Horner: In reply, I would like to ask the Court to take into consideration and possibly read the Hanover case. It has a long discussion on whether or not under Section 27 cause of action must be proved and the case holds that it does not and that Section 27 is not unconstitutional and I think I can supply the Court with numerous other cases under Section 27 Plaintiff need not prove a cause of action.

The Court: Overrule the Plea of Privilege.

Mr. Westbrook: Please note our exception.

---

[1]was
[2]citing

We, the undersigned, Counsel for Plaintiffs and Defendant in Cause Number 73-1944-3 styled Virgil B. Starnes vs. American Motorists Insurance Company, in the Plea of Privilege hearing heard in the 74th District Court of McLennan County, Texas, here agreed that the foregoing is a true and correct transcript of the evidence adduced and other proceedings had upon hearing of said Plea of Privilege.

APPROVED:

/s/ FRED HORNER
Attorney for Plaintiff

/s/ JOEL W. WESTBROOK
Attorney for Defendant

* * *

THE STATE OF TEXAS :
COUNTY OF McLENNAN :

I, Lillian Bruce McDonald, Official Court Reporter in and for the 74th Judicial District Court of McLennan County, Texas, do hereby certify that the above and foregoing is a true and correct Statement of Facts introduced into evidence upon the Plea of Privilege hearing in said cause, including all objections, the rulings of the Court, and exceptions taken thereto, including all exhibits introduced in said hearing.

/s/ LILLIAN BRUCE McDONALD
Lillian Bruce McDonald,
Official Court Reporter in and
for the 74th Judicial District
Court of McLennan County,
Texas

Examined, approved, and ordered filed as the Statement of Facts of the Plea of Privilege hearing in the above cause on this the 18th day of July, A.D., 1974.

/s/ DERWOOD JOHNSON
Judge Presiding

No. 73-1944-3

IN THE DISTRICT COURT
74TH JUDICIAL DISTRICT
MCLENNAN COUNTY, TEXAS

VIRGIL B. STARNES

v.

AMERICAN MOTORISTS INSURANCE COMPANY

ORDER OVERRULING PLEA OF PRIVILEGE

On this 28th day of June, 1974, came on to be heard the Plea of Privilege of the defendant American Motorists Insurance Company, and came the plaintiff and the defendant through their attorneys, and announced ready to proceed on the hearing of the Plea. A jury was waived and the matter was heard by the Court. The Court heard the evidence and argument of counsel and is of the opinion that the Plea of Privilege should be overruled. It is, therefore,

ORDERED, ADJUDGED AND DECREED that the Plea of Privilege of the defendant American Motorists Insurance Company is hereby in all things overruled.

SIGNED AND ENTERED this 28th day of June, 1974.

/S/ DERWOOD JOHNSON
Judge Presiding

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543
May 30, 1975

Joel W. Westbrook, Esq.
1910 National Bank of Commerce Bldg.
San Antonio, Texas 78205

RE: American Motorists Insurance
Company v. Virgil B. Starnes

No. 74-1481

Dear Mr. Westbrook:

The above-captioned appeal was docketed in this Court on May 27, 1975, as No. 74-1481.

A form is enclosed for notifying opposing counsel that the case was docketed. Also enclosed is a form for the entry of your appearance.

Very truly yours,
MICHAEL RODAK, JR., Clerk
By LORETTA S. RUFFIN
(Mrs.) Loretta S. Ruffin
Assistant Clerk

jmh
Enclosures

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 6, 1975

Joel W. Westbrook, Esq.
1910 National Bank of Commerce Bldg.
San Antonio, Texas 78205

RE: American Motorists Insurance
Company v. Starnes, No. 74-1481

Dear Mr. Westbrook:

The Court today took the following action in the above case:

"In this case probable jurisdiction is noted."

Enclosed are memorandums describing the time requirements and procedures under the Rules.

The additional docketing fee of $50, Rule 52(a) is due and payable.

Very truly yours,
MICHAEL RODAK, JR., Clerk
By JUNE M. HOFFMANN
(Miss) June M. Hoffmann
Assistant Clerk

Enclosures
AIR MAIL

Supreme Court, U.S.
FILED
SEP 6 1975
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1481

AMERICAN MOTORISTS INSURANCE COMPANY,
Appellant,

v.

VIRGIL B. STARNES,
Appellee.

MOTION TO DISMISS

DUNNAM, DUNNAM & DUNNAM
4125 West Waco Drive
Post Office Box 8418
Waco, Texas 76710
Attorneys for Appellee.

BYRON-WARLICK

In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1481

AMERICAN MOTORISTS INSURANCE COMPANY,
Appellant,

v.

VIRGIL B. STARNES,
Appellee.

MOTION TO DISMISS

To the Honorable Supreme Court of the United States of America:

STATEMENT OF THE NATURE AND RESULT OF THE CASE

Appellant's statement of the facts is substantially correct.

JURISDICTION

In 1963 the Houston Court of Civil Appeals in a lengthy and well-reasoned opinion, *Commercial Insurance Co. of Newark, N.J. v. Adams*, 366 S.W. 2d 801 (Tex. Civ. App. writ ref'd), later approved by the Supreme Court of Texas, analyzed all the authorities relied upon by Appellant and

concluded that the Rule announced by this Honorable Court in *Metropolitan Casualty Insurance Company of New York v. Brownell*, 294 U.S. 580, 55 S. Ct. 538, controlled the question raised by Appellant. That Rule is "A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of the facts reasonably may be conceived to justify it". This Honorable Court again stated this Rule in *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 79 S. Ct. 437, as follows: "If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of differences or policy, there is no denial of the equal protection of the law".

The Houston Court then presented four sets of facts which they reasonably conceived to justify Subdivision 27 of Article 1995 V.T.C.S. These are briefly summarized as follows:

(1) Since Subdivision 27 requires that the defendant maintain an agency or representative in the County wherein it is sued, the defendant is insured that the County of trial is one where the defendant corporation is known and with which it is familiar. If the foreign corporation is a plaintiff, the provisions of Subdivision 27 are fully available to it.

(2) If the foreign corporation was not authorized to do business in Texas but in fact was doing so it would place an onerous burden upon the plaintiff to ascertain its principal office and the County in which it is located. In addition, if the foreign corporation is authorized to do business in this State it may well designate its principal office in a County far removed from the population centers of this State, in which it conducts little or no business. The real "principal office" of any foreign corporation, naturally, is going to be in the State of its incorporation. Therefore, the foreign corporation unlike a domestic corporation is permitted to choose any city in the State of Texas as its principal place of business.

(3) Even though foreign corporations submit to a certain degree of control by qualifying to do business in Texas, the State is still unable to give its citizens the same assurance of effective redress for injuries committed by foreign corporations as it can in the case of domestic corporations.

(4) Further justification is the fact that the Texas Legislature may well have intended to spread litigation involving foreign corporations among the different courts of the State in order to alleviate the overcrowded dockets of the metropolitan courts.

Appellant in his jurisdictional statement additionally complains that because Subdivision 27 does not require a plaintiff to prove by a preponderance of the evidence the elements of its cause of action at the venue hearing, foreign corporations are deprived of discovery of plaintiff's case as well as the opportunity to prevent the case from developing into a "cumbersome, time-consuming lawsuit". This is patently false. The Trial Court in a venue hearing can enter only two alternative Orders. Those are: (1) Over-rule the defendant's plea of privilege, or (2) Sustain the plea of privilege and enter an Order transferring the cause to the County requested by the defendant. The Court is absolutely without power to dispose of the merits of the case by this hearing. One of the primary practical purposes of the venue hearing relied upon by defendants is that of delay and hopefully removing the cause to a Court with a more crowded docket, further postponing any trial on the merits. Texas now has very liberal rules of discovery much like those in the Federal system which are fully available to any defendant whether a natural person or a foreign corporation. Appellant further complains that since either party is entitled to a trial by jury to determine the venue facts, that a foreign corporation is deprived of the opportunity to obtain a preliminary assessment by the jury of the plaintiff's creditability. In this connection, it should be pointed out that the instant case was heard by the Trial Court and the defendant made no request for a jury. It should be further noted that a cause of action may well be proved without the plaintiff being present.

Appellee respectfully urges this Honorable Court to give its careful attention to the Adams case, *supra*, and the arguments therein presented. The reasoning of this decision clearly shows that no substantial Federal question has been presented by Appellant and therefore this Appeal should be dismissed.

Respectfully submitted,

DUNNAM, DUNNAM & DUNNAM
4125 West Waco Drive
Post Office Box 8418
Waco, Texas 76710

By: FRED HORNER
Fred Horner
Attorneys for Appellee.

CERTIFICATE OF SERVICE

I hereby certify that on this the 6th day of September, 1975, three copies of the foregoing Motion to Dismiss were mailed to Joel W. Westbrook, 1910 National Bank of Commerce Building, San Antonio, Texas 78205, attorney for Appellant. I further certify that all parties required to be served have been served.

FRED HORNER
Fred Horner

Supreme Court, U. S.
FILED
NOV 20 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1481

AMERICAN MOTORISTS INSURANCE COMPANY,
Appellant,

v.

VIRGIL B. STARNES,
Appellee.

ON APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS
TENTH SUPREME JUDICIAL DISTRICT

BRIEF FOR APPELLANT

JOEL W. WESTBROOK
MATT C. C. BRISTOL, III
1910 National Bank of Commerce Building
San Antonio, Texas 78205
(512) 226-6293

PHILIP E. McCLEERY
1200 American Amicable Building
Waco, Texas 76701
(817) 756-7231
Attorneys for Appellant

Of Counsel:
TRUEHEART, McMILLAN, WESTBROOK, HOFFMAN & RUSSELL
SHEEHY, LOVELACE & MAYFIELD

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1481

AMERICAN MOTORISTS INSURANCE COMPANY,
Appellant,

v.

VIRGIL B. STARNES,
Appellee.

ON APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS
TENTH SUPREME JUDICIAL DISTRICT

BRIEF FOR APPELLANT

Appellant appeals from the judgment of the Court of Civil Appeals of Texas, Tenth Supreme Judicial District, entered on October 17, 1974, affirming the judgment of the 74th Judicial District Court of McLennan County, Texas, overruling appellant's plea of privilege to be sued in the county of its residence and principal office, Dallas County, Texas, and holding that the Texas statute upon which this decision was based is not repugnant to the equal protection clause of the Fourteenth Amendment to the United States Constitution.

OPINION BELOW

The opinion of the Court of Civil Appeals of Texas for the Tenth Supreme Judicial District is reported at 515 S.W. 2d 354, and was reproduced, together with other motions, orders and notices pertinent to this appeal, as Appendix A to Appellant's Jurisdictional Statement filed previously in this Court.

JURISDICTION

The judgment of the Texas Court of Civil Appeals from which this appeal is taken was entered on October 17, 1974. A timely motion for rehearing was filed on October 31, 1974, and overruled on November 21, 1974. Appellant filed a timely application for writ of error with the Supreme Court of Texas on January 2, 1975, and this application was dismissed for want of jurisdiction on February 26, 1975, without an opinion. Notice of appeal to the Supreme Court of the United States was filed in the Texas Court of Civil Appeals for the Tenth Supreme Judicial District on March 18, 1975. The jurisdiction of the Supreme Court of the United States to review the decision of the Texas Court of Civil Appeals is conferred by Title 28, U.S.C. Section 1257(2). This appeal was docketed on May 27, 1975, and probable jurisdiction was noted by this Court on October 6, 1975.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The provision of the United States Constitution here involved is the Equal Protection Clause of the Fourteenth Amendment.

The statute here involved is the general venue statute of the State of Texas, Tex. Rev. Civ. Stat. Ann. Art. 1995 (1950), which provides in pertinent part:

"No person who is an inhabitant of this State shall be

sued out of the county in which he has his domicile except in the following cases:

* * * *

"3. Non-residents; residence unknown.—If one or all of several defendants reside without the State or if their residence is unknown, suit may be brought in the county in which the plaintiff resides.

* * * *

"23. Corporations and associations.—Suits against a private corporation, association, or joint stock company may be brought in the county in which its principal office is situated; or in the county in which the cause of action or part thereof arose; *or in the county in which the plaintiff resided at the time the cause of action or part thereof arose, provided such corporation, association or company has an agency or representative in such county; or, if the corporation, association or joint stock company had no agency or representative in the county in which the plaintiff resided at the time the cause of action or part thereof arose, then suit may be brought in the county nearest that in which plaintiff resided at said time in which the corporation, association or joint stock company then had an agency or representative.* Suits against a railway corporation, or against any assignee, trustee or receiver operating its railway, may also be brought in any county through or into which the railroad of such corporation extends or is operated. Suits against receivers of persons and corporations may also be brought as otherwise provided by law.

* * * *

"27. Foreign Corporations.—*Foreign* corporations, private or public, joint stock companies or associations, not incorporated by the laws of this State, and doing business within this State, may be sued in any county where the cause of action or a part thereof accrued, *or in any county*

where such company may have an agency or representative, or in the county in which the principal office of such company may be situated; or, when the defendant corporation has no agent or representative in this State, then in the county where the plaintiffs or either of them reside." (emphasis added)

Subdivision 27, which provides an alternative county for venue of suits against foreign corporations only, is the portion of the statute being challenged.

QUESTION PRESENTED

Whether that portion of subdivision 27 of Article 1995 which allows a foreign corporation, authorized to do business in Texas, to be sued in *any* county where it has an agency or representative, without regard to where the plaintiff resided at the time his cause of action arose, is repugnant to the Equal Protection Clause of the Fourteenth Amendment, inasmuch as there is no rational basis for Texas' distinction for venue purposes between a foreign corporation authorized to do business in Texas and a domestic corporation, which, regardless of where it has an agency or representative, may only be sued in a county away from that of its domicile or principal office upon proof under subdivision 23 that the plaintiff resided in or near such county at the time his cause of action arose, a showing which under Texas law requires the plaintiff, at a preliminary venue hearing, to prove the existence of his cause of action by a preponderance of the evidence.

STATEMENT OF THE CASE

Appellee, Virgil B. Starnes, a resident of McLennan County, Texas, filed suit in McLennan County against appellant, American Motorists Insurance Company, under the uninsured motorist provisions of a liability insurance policy

issued to appellee by appellant. The automobile collision out of which this cause of action and appellee's damages arose occurred in Fort Worth, Tarrant County, Texas. Appellant is an Illinois corporation which conducts its Texas business operations under a certificate of authority issued by the Texas State Board of Insurance, and which maintains its principal Texas offices in Dallas County, Texas. Process was served, in accordance with the Texas Insurance Code, upon appellant's statutorily designated process agent, the Commissioner of Insurance, at Austin, Travis County, Texas. Appellant filed a plea of privilege[1] to be sued in the county of its residence[2], Dallas County. Appellee filed a controverting plea,[3] asserting venue in McLennan County under both subdivisions 23 and 27, but at the hearing upon the plea of privilege relied exclusively upon subdivision 27[4] and a stipulated showing that appellant was a foreign corporation transacting business in Texas with a local agent in McLennan County. Appellee was not required, nor did he attempt, to offer evidence as to any of the constituent elements of his cause of action during the course of the plea of privilege hearing, and the trial court overruled appellant's plea of privilege. Appellant argued before the Court of Civil Appeals

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[1] A plea of privilege is a verified pleading by which, under Texas practice, a defendant challenges the venue of a suit. Tex. R. Civ. P. 86.

[2] The words "domicile" and "inhabitant" have, for purposes of, Article 1995, been interpreted to mean "residence" and "resident," *Pittsburg Water Heater Co. of Texas v. Sullivan*, 282 S.W. 576 (Tex. Comm. App. 1926).

[3] A controverting plea is a verified pleading by which, under Texas practice, the plaintiff states specifically the grounds relied upon to confer venue in the county of suit under one or more of the subdivisions of Article 1995. Tex. R. Civ. P. 86.

[4] Plaintiff's residence in the county wherein he filed this suit is not material to the establishment of venue in such county under subdivision 27, unless the defendant corporation has no agency or representative at any location within the State of Texas.

of Texas, Tenth Supreme Judicial District, that subdivision 27 is unconstitutionally discriminatory, because it permits a foreign corporation, which has affirmatively submitted itself to state controls by acquisition of a certificate of authority, to be venue bound without plaintiff's having to prove a cause of action, but only by proof of the existence within the venue county of defendant foreign corporation's agent, as compared with the requirement of subdivision 23, as construed by the Texas courts,[5] that a Texas domestic corporation can be venue bound only upon proof by the plaintiff of each and every element of his cause of action by a preponderance of the evidence. The Court of Civil Appeals, relying primarily upon what it deemed to be a prior authoritative holding of the Texas Supreme Court,[6] and declining an invitation to re-examine the question in the light of the then recent order of the Supreme Court of the United States noting probable jurisdiction in *Exxon Corporation v. Jay M. Preston*, No. 73-232, 414 U.S. 1038,[7] affirmed the judgment of the trial court. Appellant then applied to the Texas Supreme Court

[5] Subdivision 23 requires that the plaintiff prove all the elements of his cause of action when he seeks thereunder to sue a domestic corporation away from its principal office. The standard of proof is the same standard which prevails during trial on the merits, i.e., preponderance of the evidence. *Victoria Bank & Trust Co. v. Monteith*, 158 S.W. 2d 63, 66 (Tex. Comm. App. 1941); *Groce v. Gulf Oil Corp.*, 439 S.W. 2d 718, 720 (Tex. Civ. App. 1969). In an uninsured motorist case, plaintiff must offer proof establishing both the making of the insurance contract and its breach, i.e., that the other vehicle was an "uninsured automobile" within the meaning of the policy, *Employers Casualty Co. v. Clark*, 491 S.W. 2d 661 (Tex. 1973), that the uninsured motorist was negligent upon the occasion in question, and that such negligence was a proximate cause of plaintiff's injuries.

[6] *Commercial Ins. Co. v. Adams*, 369 S.W. 2d 927 (Tex. 1963), refusing writ of error, 366 S.W. 2d 801 (Tex. Civ. App. 1963). Both the opinion of the Texas Court of Civil Appeals and the Texas Supreme Court's per curiam decision were reproduced and included within Appellant's Jurisdictional Statement at Appendix C thereto.

for a writ of error, but that court dismissed the application for want of jurisdiction, thus presenting this Court with a viable, ripe, and extremely important constitutional issue that has not only created much conflict among the appellate courts of Texas, but has adversely affected, and continues to adversely affect, not only this Appellant, but also many of the nation's largest corporations which transact business daily in Texas, under much the same degree of State supervision and control as Texas domestic corporations, but which are, for one reason or another, incorporated under the laws of another state.[8]

SUMMARY OF ARGUMENT

While a state may impose conditions upon the entry of any foreign corporation to do business within its borders, once it has permitted them to enter, the adopted (or domesticated) corporations are entitled to equal protection with the state's own corporate progeny. The surrender of constitutional rights cannot be the price of admission.

The fly in the ointment of the Texas venue statute is that it fails to include those domesticated foreign corporations, i.e., those which have secured a certificate of authority to do business in Texas, and thereby submitted to virtually the same controls which apply to their domestic counterparts,

[7] Remanded by this Court, on February 19, 1974, to the Texas Court of Civil Appeals, Ninth Supreme Judicial District, for consideration of a question of mootness. The opinion of that Texas court, holding that the issue had indeed become moot, is reproduced at Appendix B of Appellant's Jurisdictional Statement. The instant appeal effects the legal resurrection of this vitally important and substantial federal constitutional issue.

[8] Appendix C to the very comprehensive jurisdictional statement filed in this Court in the *Exxon* case contained information to the effect that of the fifty largest corporations *headquartered* in Texas during 1972, only nine were domestic corporations. Moreover, as of August 31, 1974, only 725 of a total of 1,705 corporations holding certificates of authority to conduct the business of insurance in Texas were domestic corporations. *Ninety-Ninth Annual Report of the State Board of Insurance, at page 1.*

within the same classification category as Texas domestic corporations. In short, the Texas statute, by lumping *all* foreign corporations together, fails to discriminate where it should and discriminates where it shouldn't.

The decision of the courts below, upholding the constitutionality of subdivision 27 of Article 1995 over Appellant's claim that it denies foreign corporations authorized to do business in Texas the equal protection of the laws, is in direct conflict with this Court's decision in *Power Mfg. Co. v. Saunders*, 274 U.S. 490 (1927), hereinafter referred to as *Saunders*. The sole issue presented in this appeal is whether a foreign corporation authorized to do business in a state may, for venue purposes, consistent with the Equal Protection Clause, be treated differently from a domestic corporation. *Saunders* holds that it may not.

In *Saunders*, this Court was confronted with an Arkansas venue statute which allowed foreign corporations, regardless of whether they were authorized to transact business in Arkansas, to be sued in any county of the State on a transitory cause of action, while domestic corporations could be sued only in counties in which they were doing business or were maintaining an office, officer, or agent. Referring to foreign corporations authorized to do business in a state and having a fixed place of business and an authorized agent on whom process may be served, this Court held that "so far as their situation has any pertinence to the venue of transitory actions it is not distinguishable from that of domestic corporations and individuals." 274 U.S. at 494.

The *Saunders* decision clearly governs the Texas statute. While the statutory scheme in Texas differs in several respects from the Arkansas statutes upon which this Court passed judgment in *Saunders*, these differences are not material to the instant appeal. It is the fact of different treatment, rather than the nature or extent of the difference, which offends the equal protection clause. The Texas statute,

article 1995, establishes broader venue, and different procedural and substantive treatment, for all foreign corporations, whether or not authorized to do business in Texas, than is provided for Texas domestic corporations.

Under subdivision 27 of article 1995, *any* foreign corporation, be it a domesticated corporation whose offices span four city blocks of downtown Dallas, or an officious interloper who pops in for a deal and then withdraws to its apparent sanctuary outside the State, can be sued in any of Texas' 254 counties in which it may have an agency or representative. Under subdivision 23, however, suits against domestic corporations may be brought outside the county where the cause of action arose or the county in which the company's principal office is located *only* by proof that the company has an agency or representative therein *and* that the plaintiff resided in or near such county at the time his cause of action arose, a showing which under Texas law requires the plaintiff, at a preliminary venue hearing, to prove the existence of his cause of action by a preponderance of the evidence.

Because subdivision 27 does not require the showing that must be made under subdivision 23, foreign corporations are deprived of a very valuable, practical opportunity to obtain a measure of discovery, at the venue hearing, as to the nature of plaintiff's cause of action and to crossexamine either the plaintiff or such witnesses as are called to establish his case. If one chooses to sue a domestic corporation in a county removed from where the cause of action arose or where the corporation has its principal offices, he must be prepared to put on a case that would at least survive a motion for instructed verdict or else the law suit will stall then and there, before it really gets started, and be transferred to the defendant corporation's home county. But the foreign corporation receives no such protection. The instant case presents a vivid example of how little a plaintiff is required to establish in order to defeat the basic venue right of a foreign corpora-

tion to be sued in the county of its domicile. It becomes readily apparent that venue, *Texas style*, involves procedural and substantive considerations and protections over and above the matter of the ultimate geographical situs of a lawsuit.

The only justifications ever advanced by the appellate courts of Texas for treating authorized foreign corporations differently, for venue purposes, from their domestic counterparts are set forth in the *Adams* case (reproduced as Appendix C to Appellant's Jurisdictional Statement). These justifications, individually and collectively, fail to sustain the classification because they either concern matters not pertinent to venue, such as service of process and collection of judgments, or they simply fail to recognize or appreciate the very comprehensive controls which Texas State agencies (in the case of this appellant, the State Board of Insurance) exercise over those foreign corporations who voluntarily submit to these controls in conjunction with their acquisition and retention of certificates of authority. In essence, the Texas venue statute represents an arbitrary and unconstitutional classification of authorized foreign corporations from domestic corporations.

A judicial suggestion to the legislature to correct this obvious inequity has apparently fallen upon deaf ears, and the Texas courts have declined an invitation to construe subdivision 27 as applying only to *unauthorized* foreign corporations. With its back thus braced against the wall, the Equal Protection Clause has no way to go other than directly at the offending Texas statute. The near half century that has elapsed since *Saunders* has seen state controls over authorized foreign corporations expand to a point where the word *foreign* has lost its significance. Given the symmetry of State control over both domestic and authorized foreign corporations with respect to their Texas enterprises, *Saunders* would shudder at such arbitrary classification as Texas presently continues to enforce with respect to venue.

ARGUMENT

THE TEXAS VENUE STATUTE IMPERMISSIBLY DENIES FOREIGN CORPORATIONS AUTHORIZED TO DO BUSINESS IN THE STATE THE EQUAL PROTECTION OF THE LAWS BY ESTABLISHING BROADER VENUE AND DIFFERENT PROCEDURAL AND SUBSTANTIVE TREATMENT THAN THAT AFFORDED DOMESTIC CORPORATIONS.

A. The Texas Venue Statute Discriminates Between Foreign Corporations Authorized To Do Business In The State And Domestic Corporations.

That the Texas venue statute discriminates between domestic corporations and foreign corporations authorized to do business in the State cannot be denied. While a comparison of subdivisions 23 and 27 reveals some similarity of treatment, at least to the extent that *all* corporations may be sued (at the option of the plaintiff, of course) in either the county where their principal offices are located or in the county where the alleged cause of action arose, the dissimilarity predominates. *Any* foreign corporation *may* be sued in *any* county in which it has an agency or representative. Especially with insurance companies, such as this Appellant, which typically conduct a great deal of business through local agents whose offices are maintained in the various counties, this venue category could conceivably include every one of the 254 counties in Texas.

The legislative history of the Texas venue statute's treatment of domestic and foreign corporations is highlighted in *Fireman's Fund Ins. Co. v. McDaniel*, 327 S.W. 2d 358, 365-68 (Tex. Civ. App. 1959). Prior to 1943, it could be said

that the Texas venue laws afforded equal treatment to all corporations, be they domestic or foreign. Although the Legislature of Texas did, by its enactment in 1885 of what is now subdivision 27 of Article 1995, manifest an intention to place foreign corporations in a venue category separate and distinct from domestic corporations, virtually the same rules governed both categories. Just one year before *Saunders* was decided, the Texas Commission of Appeals, in an opinion subsequently adopted by the Texas Supreme Court,[9] observed:

> "Our courts make no distinction, so far as venue is concerned, between a domestic and foreign corporation. Nor do the statutes themselves make any such distinction. Exception 24 to Article 1830, referring to domestic corporations [a predecessor to the present subdivision 23, Article 1995], and exception 28 thereto [now subdivision 27, Article 1995] referring to foreign corporations, read exactly alike as to where such defendants are suable. Again, it has been the statutory law in Texas for years that when a foreign corporation obtains a permit to do business in this state, 'it shall have and enjoy all the rights and privileges conferred by the laws of this state on corporations organized under the laws of this state.' "[10]

282 S.W. at 579. Prior to 1943, *any* corporation could be sued in any county where it maintained an agency or representative. In 1943, however, the Texas Legislature amended the venue statute and enacted what is now subdivision 23. By deleting the provision allowing suit "in any county where

[9] *Pittsburg Water Heater Co. of Texas v. Sullivan.* See note 2, supra.

[10] The present statutory counterpart to the last quoted clause is Tex. Bus. Corp. Act, Art. 8.02A.

such [corporation] may have an agency or representative" from the subdivision applicable to domestic corporations, and introducing the requirement of proving a cause of action at a venue hearing against a domestic corporation if the suit is brought outside the county wherein the principal office is located, the Texas Legislature greatly narrowed the breadth of the venue exception for domestic corporations, and created the discriminatory classification to which this appeal is directed. The 1943 amendments did not alter the law governing venue of suits against foreign corporations.

Notwithstanding the mandate of what is now Tex. Bus. Corp. Act, Art. 8.02A, that those foreign corporations which have secured a Texas certificate of authority shall enjoy all the rights and privileges conferred by the laws of Texas upon domestic corporations, the Texas venue statutes have *never*, either before or after 1943, discriminated between authorized and unauthorized foreign corporations. Before the amendment *all* foreign corporations received substantially the same venue treatment as domestic corporations; thereafter, *all* foreign corporations, regardless of whether they had secured admission to Texas under a certificate of authority, were collectively relegated to the status of second class corporate citizens.

Just one year prior to the Texas Supreme Court's refusal of the application for writ of error in the *Adams* case,[11] the Texas Supreme Court, in *State v. State Mut. Life Assur. Co.*, 353 S.W. 2d 412 (Tex. 1962) cited both *Saunders* and *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949) for the prop-

[11] See note 6, supra. Refusal of the writ of error constitutes an unqualified approval by the Texas Supreme Court of not only the decision of the Court of Civil Appeals but also the legal theories or principles upon which the decision was based. In terms of precedential value, the decision of the Court of Civil Appeals in *Adams* is tantamount to a Supreme Court pronouncement. Tex. R. Civ. P. 483. *Continental Oil Co. v. P.P.G. Industries*, 504 S.W. 2d 616 (Tex. Civ. App. 1973).

osition that the right of a foreign corporation to do business within the State of Texas may not be conditioned upon compliance with regulations which are repugnant to the Constitution of the United States. It is interesting to observe the apparent irony of these circumstances, in that the combination of *Glander*, with its familiar admonition that where a state elects to admit foreign corporations to transact business "the adopted corporations are entitled to equal protection with the state's own corporate progeny," and *Saunders*, wherein this Court held that the Equal Protection Clause barred state discrimination between authorized foreign corporations, having a fixed place of business and an authorized process agent in the state, and their domestic corporate counterparts with respect to the venue of transitory actions, would seemingly seal the coffin of that portion of the Texas venue statute challenged in *Adams* and in the instant appeal.

It might be helpful at this point to provide a somewhat more expanded explanation of the procedural functioning of the Texas venue law. The Texas venue statute, Tex. Rev. Civ. Stat. Ann. Art. 1995, establishes a basic right to be sued in the county of one's domicile. The term "domicile" has been construed to be synonymous with "residence."[12] The term "venue" denotes the county in which a plaintiff has the legal right to institute and maintain his suit, notwithstanding the defendant's objections.[13] The venue statute is to be strictly construed favorably to the rights of defendants, and the burden is upon the plaintiff to plead and prove that his cause comes within one or more of the thirty-four enumerated exceptions [subdivisions] to the general rule.[14] In order to challenge the venue of a suit brought against him, a defendant files a verified "plea of privilege" to be sued in the

[12] See Note 2, supra.
[13] *National Life Co. v. Rice*, 167 S.W. 2d 1021 (Tex. Comm. App. 1943).
[14] *Brown v. Clary*, 315 S.W. 2d 385 (Tex. Civ. App. 1958).

county of his domicile. This pleading constitutes *prima facie* proof of the defendant's right to a change of venue. In order to join issue and prevent a summary transfer of the case, the plaintiff must then file a "controverting affidavit" which must specifically state the grounds relied upon to confer venue under one[15] of the subdivisions of Article 1995. One Texas jurist has observed that more venue cases reach the appellate courts in Texas than in all the other states combined,[16] a logical byproduct of the numerous and overlapping exceptions to the Texas venue statute.[17] When the issue has been joined by the timely filing of a controverting affidavit, a plea of privilege hearing is held, normally prior to trial on the merits. At this hearing the plaintiff bears the burden of proving the requisite venue facts by a preponderance of the evidence. Either party is entitled to demand that a jury determine the venue facts,[18] but if the defendant demands a jury, the trial court has discretion to require that the entire cause be tried on its merits at the same time.[19]

[15] It is not an infrequent occurrence that a plaintiff will set forth, in his controverting plea, facts which would sustain venue in the county of suit under several of the different subdivisions of Art. 1995.

[16] Langley, *A Suggested Revision of the Texas Venue Statute*, 30 Texas Law Review 547, 548 n. 4 (1952). This same article recognizes that subdivision 27 would, under the *Saunders* decision, contravene the Equal Protection Clause, see p. 563, and suggested that no distinction should be made between foreign and domestic corporations in so far as venue is concerned.

[17] Appendix "A" to this Brief sets forth the entire text of the Texas Venue Statute, Tex. Rev. Civ. Stat. Ann. Art. 1995, in its present form.

[18] *Merryman v. Zeleny*, 143 S.W. 2d 410 (Tex. Civ. App. 1940).
[19] Tex. R. Civ. P. 87.

The venue facts which plaintiff must prove at the plea of privilege hearing vary according to which subdivision[20] he chooses to rely upon in order to keep the lawsuit in the county wherein he filed it. Where, as in the instant case, a plaintiff seeks to sustain venue against a foreign corporation under subdivision 27's "or in any county where such company may have an agency or representative" provision, all that need be established is that the defendant has an "agency or representative" in that county. This merely requires proof that the defendant does business in the county "in a more or less regular and permanent form" or that some person in the county can exercise powers on behalf of the company.[21] Under subdivision 23, a plaintiff who seeks to sue a domestic corporation away from the county of its principal office must prove each and every element of his cause of action, by a preponderance of the evidence; in short, it is necessary to prove by a preponderance of the evidence that a cause of action exists against a domestic corporation, even though it may have any number of agencies or representatives in the county of suit. Were this appellant, in the instant case, a Texas domestic corporation, the plaintiff would have been required to offer competent evidence to establish, by a preponderance of the evidence, both the execution and breach of the insurance contract pursuant to which his claim was brought. Since this is an uninsured motorists case, proof of the details of a vehicle collision in Fort Worth, Tarrant County, Texas, would have had to have been offered, in order to establish that the other vehicle was an "uninsured automobile" within the meaning of the policy, that the uninsured

[20] Even though several subdivisions of Art. 1995 may arguable apply to a given cause of action, and in fact be set forth in plaintiff's controverting affidavit, the tactics of Texas venue would dictate that plaintiff, at the plea of privilege hearing, rely upon the single subdivision to which the least onerous burden of proof attaches.

[21] *Milligan v. Southern Express, Inc.*, 250 S.W. 2d 194 (Tex. 1952).

motorist was negligent upon the occasion in question, and that such negligence was a proximate cause of plaintiff's injuries or damage.[22]

Appellant was thus afforded significantly different treatment, with consequences which a non-Texan would normally not associate with the question of venue, solely by reason of the locus of its corporate birthplace (or, more appropriately, its corporate citizenship). Because subdivision 27 does not require the showing[23] that must be made under subdivision 23, Appellant neither saw nor heard anything about the vehicle accident, out of which its adversary's claim arose, at the venue hearing. The entire emphasis was not upon the nature or sufficiency of the cause of action, but rather the presence of one of appellant's agents in the county of suit. Denied to appellant was a virtually unique opportunity afforded to domestic corporations, to preview its adversary's case in chief (except as to the extent of damages); to cross-examine plaintiff's witnesses as to the nature and existence of the alleged cause of action; to obtain from the Court a venue ruling which would, under the circumstances, be tantamount to a judicial assessment of plaintiff's cause of action; to nip a frivolous or baseless claim "in the bud," before it could escalate into a lengthy, complex and time-consuming lawsuit; and finally, to obtain, by demanding a jury trial of the

[22] *Employers Casualty Co. v. Clark*, see Note 5, supra.

[23] *Hanover Ins. Co. v. Sanford*, 457 S.W. 2d 115 (Tex. Civ. App. 1970), also an uninsured motorists claim against a foreign corporation insurer authorized to do business in Texas. While plaintiff's controverting plea cited subdivisions 3, 5, 9a, 23, 27, 28 and 29a of Art. 1995, as authority for sustaining venue in the county of suit, he relied exclusively upon subdivision 27 when before the Court of Civil Appeals. See Note 20, supra. Justice Quentin Keith, in a concurring opinion, observed: "... I point out this self-evident fact: The affirmance is required *solely* because Hanover is a foreign corporation. If it were a domestic corporation, the judgment below would be reversed. In my opinion, this is an obnoxious and discriminatory result, and one which should be called to the attention of the Legislature." 457 S.W. 2d at 119.

venue facts, either an early trial on the merits or at least a preliminary assessment by a jury of the plaintiff's credibility.

No one, including appellee, can deny that the Texas venue statute does discriminate in its substantive and procedural treatment of foreign corporations, regardless of whether they have become *domesticated* in connection with their acquisition of a Texas certificate of authority, vis-a-vis the treatment of domestic corporations. No one *has* denied it. Appellee's only recourse, in order to sustain the statutory classification herein assailed, is to do precisely what the Texas Court of Civil Appeals did in the *Adams* case, and either distinguish or discount *Saunders*, while at the same time beating the judicial underbrush to find one or more identifiable "rational justifications" in support of what is essentially an arbitrary classification in the context of the Equal Protection Clause.

B. No Rational Explanation Justifies the Disparate Venue Treatment Afforded Foreign Corporations Authorized To Do Business in Texas Vis-vis the Treatment Afforded Domestic Corporations.

Both the historical background of the statutory classification to which this appeal is directed, which has, to a certain extent, already been addressed in this Brief, and a realistic analysis of those characteristics of authorized foreign corporations and domestic corporations which have any pertinence to venue, lead one to the inescapable conclusion that the classification in question is utterly irrational and in fact *arbitrary*. The 1971 Edition of the Oxford English Dictionary[24] defines the term "arbitrary" as "Derived from mere opinion or preference; not based on the nature of things; hence, capricious, uncertain, varying." *Arbitrary* may at first glance seem a bit too harsh a term for a member of the Bar of this Court to use in these circumstances. It is prob-

[24] Oxford University Press 1971. Library of Congress Catalogue Card Number: 76-188038.

ably one of the most powerful and enveloping words in the lawyer's verbal arsenal. And yet it must not be forgotten that it is the *classification* itself to which the term refers, and not those courts which have sustained it, nor the legislators who have up until now ignored an invitation to change it.

Prior to 1943 there was no discrimination as to venue between domestic and foreign corporations in Texas. As previously noted, there was *categorization* but no discrimination.[25] Why would the Texas Legislature in 1885 establish a separate category if the same venue rules were to be applied? The answer lies in the realization that the 1885 legislative enactment[26] dealt not only with venue of actions against foreign corporations, but also, and perhaps more importantly, with the matter of how to secure effective service of process upon such corporations. The 1943 amendments were not directed at subdivision 27 or specifically at foreign corporations. The discrimination was born of the legislature's conferring a benefit, i.e., a narrowing of the scope of the venue exception, upon domestic corporations without granting foreign corporations the same protection. One might well speculate that the discrimination was unintentional. Supportive of this theory is the fact that our Texas Supreme Court had, subsequent to the *Saunders* decision and prior to 1943, adopted several opinions of the Texas Commission of Appeals which stated that subdivision 23 was broad enough to apply to both domestic *and* foreign corporations.[27] This language appears to have been unnecessary to the decisions reached, thus *obiter dicta*, but certainly no comfort to authorized foreign corporations, such as appellant, involved in post-1943 litigation. Even if the present subdivision 23 were construed to apply to all corporations, whether domes-

[25] *Fireman's Fund Ins. Co. v. McDaniel*, supra, 327 S.W. 2d 365-66.
[26] Acts of 19th Leg., 1885 (G.L. Vol. 9, p. 699).
[27] *Grayburg Oil Co. v. Powell*, 15 S.W. 2d 542 (Tex. Comm. App. 1929) is but one of these decisions. The others are cited in *Fireman's Fund Ins. Co. v. McDaniel*, supra, at 327 S.W. 2d 366.

tic or foreign, the continued existence of the more specific subdivision 27 would render such a judicial construction of no benefit to appellant, for, as we have seen, a plaintiff need only establish the applicability of *one* of the various venue exceptions to his lawsuit, and the tactics of Texas venue practice lead plaintiffs to that exception which requires the least proof. Such is the nature of that portion of subdivision 27 herein assailed, a clause consisting of a mere thirteen words, but abounding with judicial and constitutional significance.

The notion that the present subdivision 27 might well be subject to an equal protection challenge under the *Saunders* ruling was included in a 1952 Texas Law Review Article, [28] but the point was not raised in the Texas appellate courts until the *McDaniel* case, [29] wherein the Court of Civil Appeals examined the historical basis for the Texas classification, and relying upon *Saunders*, held subdivision 27 to be unconstitutional. The *McDaniel* case was not appealed to the Texas Supreme Court, and the next case facing the issue also found that subdivision 27 denied foreign corporations the equal protection of the law. *Maryland Cas. Co. v. Torrez*, 359 S.W. 2d 559 (Tex. Civ. App. 1962). *Torrez* was appealed, but the Texas Supreme Court found that it did not have jurisdiction[29a] to decide the constitutional issue, 363 S.W. 2d 235 (Tex. 1962). The following year, the constitutionality of subdivision 27 was sustained in *Commercial Ins. Co v. Adams*, 366 S.W. 2d 801 (see note 6, supra.) which opinion

[28] See Note 16, supra.

[29] See Note 25, supra.

[29a] The appellate jurisdiction of The Texas Supreme Court is limited both by statute and by appellant's choice of which sections of the statute he will cite in his application for writ of error in order to sustain jurisdiction. In *Torrez*, the absence of a dissenting opinion in the Court of Civil Appeals, or a previous decision of either the Texas Supreme Court or another Court of Civil Appeals which was in conflict with the *Torrez* civil appeals decision, rendered jurisdiction lacking under the application there made.

was approved by the Texas Supreme Court. 369 S.W. 2d 927 (Tex. 1963). Since *Adams*, there have been a number of Texas appellate opinions, all in the Courts of Civil Appeals,[29b] which have, as is their duty, adhered to the decision of the Texas Supreme Court in *Adams*. In a relatively recent case, a Texas Court of Civil Appeals rejected what it termed an ingenious argument, on behalf of a foreign insurance company having a certificate of authority to do business in Texas, that subdivision 27 should be construed to apply only to *unauthorized* foreign corporations, with subdivision 23 encompassing both domestic corporations and authorized foreign corporations.[30] It was in this judicial context that the Court of Civil Appeals for the Tenth Supreme Judicial District considered and rejected this appellant's challenge to subdivision 27. 515 S.W. 2d 354. Exxon Corporation[31] did its best to carry this same constitutional issue to this Court

[29b] There are fourteen separate Courts of Civil Appeals within the State of Texas. Three different courts decided *McDaniel, Torrez* and *Adams*, respectively. *Hanover* (see Note 23, supra), *McDaniel, Hicks* (Note 30, infra) and *Exxon* were all decided by the Court of Civil Appeals for the Ninth Supreme Judicial District, at Beaumont, Texas.

[30] *Home Indemnity Company of New York, N.Y. v. Hicks*, 488 S.W. 2d 614 (Tex. Civ. App. 1972). The appellants argued that the 1943 amendment to subdivision 23 impliedly amended subdivision 27. The Court, however, found neither any ambiguity in subdivision 23 nor any manifestation of a legislative intention that foreign corporations were to be recipients of the benefits conferred by the 1943 amendment to subdivision 23. Being bound by the *Adams* decision on the constitutional issue, the Court observed that the wisdom of the provision was a matter for the Legislature.

[31] *Exxon Corporation v. Jay M. Preston*, No. 73-232, probable jurisdiction noted November 19, 1973, at 414 U.S. 1038. Remanded to the Texas Court of Civil Appeals February 19, 1974, for a determination of question of mootness. See Appendix B to Appellant's Jurisdictional Statement in the instant appeal.

for a decision, but after the noting of probable jurisdiction and submission by Exxon of its Brief,[32] the issue fell victim to what may, for want of a better term, be called "intentional mooting" at the hands of the appellee.

If the historical development of the Texas venue laws, as they relate to actions against domestic corporations and foreign corporations having a certificate of authority to do business in Texas, tends to raise red flags of irrationality, such predictions are borne out by an analysis of the realities of corporate life in Texas for both classes of corporations. The State of incorporation is the only difference between appellant and its counterparts who are Texas domestic corporations. All corporations which engage in the business of insurance in Texas, whether foreign or domestic, are licensed by, and subject to the rather comprehensive regulations of, the Texas State Board of Insurance. Foreign insurance companies constituted fifty-seven per cent of the total number of licensed insurers in Texas as of August 31, 1974.[33] Essentially the same certificate of authority must be secured by both foreign and domestic companies. Compliance with the numerous provisions of the Texas Insurance Code, including regulations promulgated by the State Board of Insurance,[34] is a condition precedent to the right of foreign insurance corporations to engage in the business of insurance in Texas,[35] and, as the Texas Supreme Court held in *State v. State Mutual Life Insurance Company of America*, 353 S.W. 2d 412 (Tex. 1962), a foreign insurer can have its

[32] The question presented herein is identical to, and framed in the same language as, the question in the *Exxon* appeal. Although differing in numerous substantive aspects, this Brief employs an argument that is organized in the same logical sequence as the Brief in *Exxon*.

[33] See Note 8, supra.

[34] Texas Insurance Code, Art. 1.04(b), vests original jurisdiction in the Board to determine policy, promulgate rules, and either promulgate or approve rates.

[35] Texas Insurance Code, Art. 21.43.

Texas certificate cancelled, at the instance of State authorities, if it conducts its Texas enterprises in violation of the Texas Insurance Code, even though the questioned activities are permitted by the laws of the state in which such foreign company was incorporated. Both domestic and foreign insurance corporations are required by law to designate an agent in the state upon whom civil process can be served. For most types of companies,[36] the Texas Commissioner of Insurance is either a mandatory or permissive designee for process agent.[37]

Although the *Texas Business Corporation Act* does not purport to govern certain specified types of corporations,[38] including corporations organized for the purpose of conducting the business of insurance, such being governed by special statutes (like the Texas Insurance Code), it should be pointed out that the same symmetry of control exists under Chapters 2 and 8, Tex. Bus. Corp. Act, with respect to *garden variety* domestic and foreign corporations. Virtually the same rules apply to both types of corporations with respect to designation of a registered office and registered agent for service of process.[39] To receive permission to do business in Texas, a foreign corporation must submit an application containing the same information required in a domestic corporation's application for a certificate of incorporation.[40] And once

[36] The Texas Insurance Code consists of a number of chapters which pertain specifically to certain kinds of insurance, such as casualty, life, health and accident, and title insurance.

[37] Appellant was served in the instant case through it's designated agent, the Texas Commissioner of Insurance.

[38] Tex. Bus. Corp. Act, Art. 9.14. Where the special licensing statute is silent as to a given area, or if it expressly provides that the general laws for incorporation shall supplement its provisions, then the provisions of the general law (Tex. Bus. Corp. Act) will apply to the extent they are not inconsistant with the special statute.

[39] Tex. Bus. Corp. Act, Arts. 2.09, 8.08.

[40] Tex. Bus. Corp. Act, Arts. 3.02, 8.05.

authorized to do business in Texas, a foreign corporation must advise the Secretary of State of Texas of any changes in its articles of incorporation, name, registered agent or office, or corporate purposes.

Under the Texas Insurance Code, not only does the State Board of Insurance exercise this same kind of control over foreign insurance companies, but it also regulates the manner in which their Texas business operations are conducted. Both domestic and foreign insurance companies in Texas are subject to the same regulations concerning advertising, the content of specific policies, and premiums rates. Comprehensive annual financial statements must be submitted by all licensed companies,[41] with foreign companies fully reporting all business activities, both within and without the State of Texas. Given the above similarities, there is no rational justification for treating *any* foreign corporation authorized to do business in Texas differently, for venue purposes, from its domestic counterpart. The ultimate test of the validity of subdivision 27 is not whether foreign corporations engaged in the insurance business (or doing any other lawful business) in Texas differ from their domestic counterparts, but whether the differences between them are pertinent to venue. *Metropolitan Casualty Ins. Co. of New York v. Brownell*, 294 U.S. 580 (1935).

The only justifications ever advanced by the appellate courts of Texas for treating a foreign corporation authorized to do business in Texas differently, for venue purposes, from a domestic corporation, are set forth in the *Adams* case. A critical analysis of these justifications reveals that they fall

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[41] The classification, or designation, made throughout this Brief as to *authorized* and *unauthorized* foreign corporations, while certainly applicable to foreign corporations in general, really does not apply to foreign insurance companies. Acquisition of a Texas certificate of authority is *mandatory* for all insurance companies who desire to engage in the business of insurance in the state.

considerably short of satisfying the *Brownell* standard. In descending order, these supposed justifications are:

(1) "It would be difficult, if not impossible, for a plaintiff to ascertain the principal office of a foreign corporation *not authorized* to do business in this state." (emphasis added) 366 S.W. 2d 808.

(2) "A foreign corporation qualified to do business in this state may designate as its principal office a county remote from the population centers of the state, in which it conducts little or no business since its principal office, in fact, ordinarily will be maintained in the state of incorporation. A domestic corporation would be likely to find such a procedure uneconomical." 366 S.W. 2d 808.

(3) "The difficulty of securing service on foreign corporations," as a factor justifying "a wide venue for actions against them." 366 S.W. 2d 808.

(4) ". . . the state is not able to give its citizens the same assurance of effective redress for injuries committed by foreign corporations as it can in the case of domestic corporations." 366 S.W. 2d 808-09.

(5) ". . . the machinery of government would not work if it were not allowed a little play in its joints." Quoting Mr. Justice Holmes in *Bain Peanut Co. of Texas v. Pinson*, 282 U.S. 499 (1931).

(6) "It could well be that the legislature had in mind spreading litigation involving foreign corporations among the various courts of the state in order to avoid the possibility of increasing the congested condition of the dockets of the metropolitan courts." 366 S.W. 2d 809.

And finally . . .

(7) Other possibilities could be explored, but, as was pointed out by the Supreme Court of the United States in Metropolitan Casualty Insurance Company of New York v. Brownell, supra, "A statutory discrimination will not

be set aside . . . if any state of facts reasonably may be conceived to justify it.' " 366 S.W. 2d 809.

One must assume that the Texas Supreme Court, by its act of refusing the application for writ of error in *Adams*, agreed with the Court of Civil Appeals as to the legal merit of these justifications,[42] and further, that if the Texas Supreme Court were aware of any additional justifications, it did not deem them significant enough to warrant granting the writ and rendering a separate opinion on the matter.

This appeal does *not* present the issue of whether the State of Texas could, consistent with the Equal Protection Clause, classify foreign corporations *not* authorized to do business in Texas separately and under different venue ground rules from domestic corporations. As noted previously, Texas has never chosen to discriminate, for venue purposes, between authorized and unauthorized foreign corporations. They are as illogically intertwined in the statute (subdivision 27) as they are in the opinion of the Court of Civil Appeals in *Adams*. The first enumerated justification obviously does not apply to authorized foreign corporations. Moreover, it would be just as difficult to locate the principal office of a domestic or authorized foreign corporation, as the designated *registered* office need not be the same as the principal place of business.[43] The second justification also must fail. Neither a domestic nor an authorized foreign corporation can *designate* its principal office.[44] Its principal office is in fact the place where it conducts most of its Texas business. The reasoning of the Court of Civil Appeals would apply equally to a domestic corporation. There is no reason to believe that it would

[42] See Note 11, supra.

[43] Tex. Bus. Corp. Act, Arts. 2.09, 8.08.

[44] An authorized foreign corporation which has designated a registered office in a particular county has established its "residence" for purposes of its basic right under Art. 1995 to be sued in the county of its "domicile." The same is true of a domestic corporation. *Ward v. Fairway Operating Company*, 364 S.W. 2d 194 (Tex. 1963).

be less economical for a domestic than a foreign corporation to designate a registered office at a place far removed from its principal office. The Court in *Adams* writes of foreign corporations as if they had but one principal office, situated snuggly within the borders of the state of incorporation, while sending out multitudes of agents with suitcases in hand, ready to take advantage of the citizenry of neighboring states whenever the opportunity arises. This may have been some semblance of reality at some point far removed in our history, but one would assume that any authorized *foreign* corporation would have a principal *Texas* office that would be as easy to identify as that of a domestic corporation.[45]

The third justification might well draw the response that service of process and venue are neither legally equivalent nor do they have a common objective. The problem of locating and serving a foreign corporation is vastly different from the matter of proper venue of an action against the corporation. As to authorized foreign corporations, like their domestic counterparts, one serves the designated registered agent. As to those fleeting unauthorized foreign corporations, one may serve any agent he can find, or, if none be found, then employ substituted service upon the Secretary of State under the Texas Long-Arm Statute, Tex. Rev. Civ. Stat., Art. 2031b. But what has all this to do with venue? The fourth justification draws the same question. If the Court means that collection of a Texas judgment against a foreign corporation is more difficult, what has collection of judgments to do with venue? And who says that today's *foreign* corporations, most of which are from tiny Delaware, are any less likely to have assets in Texas from which a judgment could be satisfied than Texas domestic corporations? If the Court means that domestic insurance corporations,[46] or any other

[45] That the original rationale for the distinction between domestic and foreign corporations no longer comports with reality, is discussed in an excellent article at 18 S.W. L. J. 291, 302, *The Constitutional Problem of Providing Venue Classification for Foreign Corporations in Texas* (1964).

kinds of domestic corporations are subject to greater controls than authorized foreign corporations, it is in error.

No one would question the wisdom of state governmental machinery retaining "a little play in its joints," of being flexible enough to serve and protect its citizens, both individual and corporate. But Texas has misaligned the "joint," placing it between all foreign corporations and domestic corporations, when the realities of the present day would dictate placement between unauthorized foreign corporations and all others. And equalization of dockets, the heart of the sixth justification, should not, as pointed out by Exxon,[47] justify treating foreign corporations differently from domestic corporations for venue purposes any more than it would justify a statute allowing wider venue of suits filed against blacks than of suits filed against whites. Lastly, one wonders how many other possibilities could be *conceived*, and what they would have to do with either venue, or its objective – convenience of trial. It is respectfully submitted than none of the justifications upon which the *Adams* Court relied to sustain the admittedly discriminatory classification, either individually or collectively, can pass constitutional muster under the *Brownell* standard and in the context of a living Equal Protection Clause.

C. That Portion Of The Texas Venue Statute Which Allows A Foreign Corporation Authorized To Do Business In The State To Be Sued In Any County Where It Has An Agency Or Representative Is Repugnant To The Equal Protection Clause Of The Fourteenth Amendment Inasmuch As No Such Venue Is Allowed In Suits Against Domestic Corporations And Because There Is No Rational Basis For This Distinction.

The message of *Saunders* is not difficult to comprehend,

[46] *Adams*, and the great majority of appellate cases in Texas which have addressed the issue of equal protection and subdivision 27, involved foreign insurance companies.

[47] *Exxon* Brief, p. 23.

nor is it at odds with the realities of establishing venue for actions against authorized foreign corporations, having a fixed place of business in the state and a designated agent upon whom process may be served. State courts have been reluctant to strike down venue statutes, and *Saunders* has in some circles been distinguished to the point of emasculation.[48] Those courts which have *sidestepped Saunders* have received no small amount of encouragement from this Court's decision in *Cincinnati St. Ry. v. Snell*, 193 U.S. 30 (1904) with its oft-quoted language that:

> "It is not under any view the mere tribunal into which a person is authorized to proceed by a State which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the State has provided equal laws prevail."

193 U.S. 36. A *domestic* corporation in the *Snell* case claimed denial of equal protection of the laws because an *individual* plaintiff had the right to transfer an action to another county although the corporate defendant had no such right. The question of available original forums was not presented in *Snell*, only the right to transfer a case from a proper venue. Other than the geographical transfer to an adjoining county, no substantive or procedural differences were present. The Missouri Supreme Court[49] succinctly expressed the Snell decision as follows:

> "The opinion holds that classification made as to corporations having 50 stockholders or more was not unreasonable and that it was in the power of the Ohio Legislature to provide that a plaintiff in a suit against a corporation having 50 stockholders or more, which was pending *in the county where the corporation keeps its principal office or transacts its principal business*, may change the venue to some other county if he shall make an affidavit that he can not have a fair trial in the county

[48] See Note 45, supra. 18 S.W. L.J. 291, 294.

[49] *McClung v. Pulitzer Publishing Co.*, 214 S.W. 193 (1919).

were the suit is instituted . . ."
214 S.W. 198. The *Snell* decision involved no attempt to discriminate between authorized foreign corporations and domestic, but its broad language has since been applied to such classifications.[50] *Saunders* dealt with a broader geographical discrimination, and precisely with the classification groups present in the instant appeal. The Arkansas venue statute required actions brought against a domestic corporation to be initiated in a county where it had a place of business, or in which its chief officer resided, but it allowed suits against foreign corporations, regardless of whether authorized to do business and having a place of business in the state, to be brought in any county of the state. This Court noted that the geographical onus presented by the venue statute tended to increase materially the burden otherwise incident to presenting a defense. Just as significant was the observation that *Snell* was "cited as if venue provisions were there held to be beyond the reach of the equal protection clause. But this is a strained and inadmissible interpretation." 274 U.S. 495. And since the Texas venue statute herein assailed is without any foundation that is logically relative to venue, such a strained interpretation of *Snell* would be its only salvation.

Not all courts have seen fit to disregard *Saunders*. Those courts which relied upon it either declared the venue statute unconstitutional,[51] or construed it so as to apply to both domestic and foreign corporations.[52] It is also interesting to note that some discriminatory statutes have been upheld upon the theory that a foreign corporation authorized to do business in the state is a "nonresident" of that state for

[50] *Phillip's Petroleum Co. v. Smith*, 61 P. 2d 184 (Okla. 1936) is but one example. The *Adams* case may be another.

[51] *Fisher Packing Co. v. Mattox*, 90 S.W. 2d 70 (Ky. 1936); *Windham v. Pace*, 6 S.E. 2d 270 (S.C. 1939); and *McDaniel* are examples.

[52] *Bohn v. Better Biscuits, Inc.*, 26 Cal. App. 2d 61, 78 P. 2d 1137 (1938).

venue purposes.[53] The Texas cases in fact take the position, seemingly inconsistent with their reluctance to afford *domesticated* corporations equal protection under the venue laws, that authorized foreign corporations are considered residents of Texas for venue purposes.[54]

Saunders remains as the specific authority that the Texas venue classification here challenged violates the command of the Equal Protection Clause. The combination of inequalities, i.e., broader venue as well as the absence of any requirement of proof of a cause of action to sustain venue against an authorized foreign corporation, renders subdivision 27 unconstitutional. While the geographical differences of venue under subdivisions 23 and 27 as to domestic and foreign corporations authorized to do business in Texas, depending upon the facts of each case, may be smaller than under the statute condemned in *Saunders*, the substantive differences in terms of proof required in order to defeat the basic right of the "resident" corporation to be sued in the county of its domicile are greater than those involved in *Saunders*. In any event, it is the fact of the violation of the constitution which brings down the offending statute. The degree of the discrimination should have no effect. The Texas Court of Civil Appeals recognized this vital point in the *McDaniel* case.

> "Obviously, the discrimination occasioned by the 1943 amendment to Subd. 23 of our statute is not as great as that occasioned by the Arkansas statute. This, however, is not the criterion. The fact that a violation of the constitution is not a great one is no reason for permitting it. A mere opinion as to the degree of wrong which would arise if the constitution were violated does not afford a measure of the duty of enforcing its provisions."

327 S.W. 2d at 367-68.

[53] *Meyer v. Anselm & Co., Inc.*, 196 Misc. 736, 94 NYS 2d 613.

[54] *J. I. Case Co. v. Darcy*, 424 S.W. 2d 501 (Tex. Civ. App. 1968); and *O. M. Franklin Serum Co. v. C. A. Hoover & Son*, 410 S.W. 2d 272 (Tex. Civ. App. 1966).

CONCLUSION

The years that have followed the shadow of *Saunders* have seen the institution of such pervasive state controls over the activities of those foreign corporations which take affirmative action to become *domesticated* in a state that the Equal Protection Clause surely cannot stand by and ignore such a facially arbitrary classification as that presented by subdivision 27 of the Texas venue statute, Article 1995. It is a fitting time to reaffirm the *Saunders* decision, and extend to authorized foreign corporations that measure of the law to which they are entitled. They have paid their dues, and should be recognized for what they are. The term "foreign" is gradually losing its significance as an adjective descriptive of this nation's corporate entities. The application of subdivision 27 to authorized foreign corporations denies them the equal protection of the law. The various justifications conceived by the Texas Court of Civil Appeals in *Adams* are not worthy of so much as a second glance from the likes of *Brownell* and *Saunders*. The judgment of the court below should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 1975, three copies of the foregoing Brief for Appellant were mailed, postage prepaid, to Fred Horner, Dunnam, Dunnam & Dunnam, 4125 West Waco Drive, Waco, Texas, 76710, attorneys for Appellee. I further certify that all parties required to be served have been served.

Joel W. Westbrook

APPENDIX "A"

Art. 1995.

[1830] [1194]

[1198] **Venue, general rule**

No person who is an inhabitant of this State shall be sued out of the county in which he has his domicile except in the following cases:

1. Repealed Acts 1967, 60th Leg., p. 951, ch. 419 Sect. 1, eff. Aug. 28, 1967.

2. Transient persons.—A transient person may be sued in any county in which he may be found.

3. Non-residents; residence unknown.—If one or all of several defendants reside without the State or if their residence is unknown, suit may be brought in the county in which the plaintiff resides.

4. Defendants in different counties.—If two or more defendants reside in different counties, suit may be brought in any county where one of the defendants resides. The transfer or assignment of a note or chose in action shall not entitle any subsequent holder to sue thereon in any other county than that in which such suit could have been prosecuted if no assignment or transfer had been made.

5. Contract in writing.—(a) Subject to the provisions of Subsection (b), if a person has contracted in writing to perform an obligation in a particular county, expressly naming such county, or a definite place therein, by such writing, suit upon or by reason of such obligation may be brought against him, either in such county or where the defendant has his domicile.

(b) In an action founded upon a contractual obligation of the defendant to pay money arising out of or based upon a consumer transaction for goods, services, loans, or extensions of credit intended primarily for personal, family, household or agricultural use, suit by a creditor upon or by reason of

such obligation may be brought against the defendant either in the county in which the defendant in fact signed the contract, or in the county in which the defendant resides at the time of the commencement of the action. No term or statement contained in an obligation described in this subsection shall constitute a waiver of this provision.

6. Executors, administrators, etc.—If the suit is against an executor, administrator or guardian, as such, to establish a money demand against the estate which he represents, the suit may be brought in the county in which such estate is administered.

7. Fraud and defalcation.—In all cases of fraud, and in all cases of defalcation by public officers, suit may be brought in the county where the fraud was committed or where the defalcation occurred, or any of such suits may be brought where the defendant has his domicile.

8. Attachment, sequestration, etc.—A suit for damages resulting from the suing out of a writ of attachment or sequestration, or for levying any such writ, may be brought in the county from which such writ was issued, or in any county where such levy was made in whole or in part.

9. Crime or trespass.—A suit based upon a crime, offense, or trespass may be brought in the county where such crime, offense, or trespass was committed by the defendant, or by his agent or representative, or in the county where the defendant has his domicile. This subdivision shall not apply to any suit based upon negligence per se, negligence at common law or any form of negligence, active or passive.

9a. Negligence.—A suit based upon negligence per se, negligence at common law or any form of negligence, active or passive, may be brought in the county where the act or omission of negligence occurred or in the county where the defendant has his domicile. The venue facts necessary for plaintiff to establish by the preponderance of the evidence to

sustain venue in a county other than the county of defendant's residence are:

1. That an act or omission of negligence occurred in the county where suit was filed.

2. That such act or omission was that of the defendant, in person, or that of his servant, agent or representative acting within the scope of his employment.

3. That such negligence was a proximate cause of plaintiff's injuries.

10. Personal property.—Suit for the recovery of personal property may be brought in any county where the property may be or where the defendant resides.

11. Inheritances.—If the defendant has inherited an estate concerning which the suit is commenced, suit may be brought in the county where such estate principally lies.

12. Lien.—A suit for the foreclosure of a mortgage or other lien may be brought in the county where the property or any part thereof subject to such lien is situated.

13. Partition.—Suits for the partition of land or other property may be brought in the county where such land or other property, or a part thereof, may be, or in the county in which one or more of the defendants reside, or in the county of the residence of any defendant who may assert an adverse claim to or interest in such property, or seeks to recover the title to the same. Nothing heerin shall be construed to fix venue of a suit to recover the title to land.

14. Lands.—Suits for the recovery of lands or damages thereto, or to remove incumbrances upon the title to land, or to quiet the title to land, or to prevent or stay waste on lands, must be brought in the county in which the land, or a part thereof, may lie.

15. Breach of warranty.—Suits for breach of warranty of title to lands may be brought in any couny where either ven-

dor resides, and all other vendors may be joined in the same suit.

16. Divorce.—Suits for divorce shall be brought in the county in which the plaintiff shall have resided for six six months next preceding the bringing of the suit. However, the hearing may be held and judgment rendered in any other county within the same judicial district if (a) no answer has been filed, or (b) the parties agree to removal of the hearing to the other county.

17. Injunctions. Suits to enjoin the execution of a judgment or to stay proceedings in any suit shall be brought in the county in which such judgment was rendered or in which such suit is pending.

17a. Labor disputes.—Suits to enjoin strikes or picketing for an unlawful purpose or conducted in an unlawful manner shall be brought (1) in the county where the strike or picketing is alleged to have occurred; or (2) if service cannot be had on any of the defendants in the county described in clause (1), in the county of the residence of the defendant or any one of the defendants, if there be more than one; or (3) in Travis County when suit is brought by the State of Texas, and the state, its agencies or a political subdivision thereof is a party to the suit. Provided, however, that where suit is filed in a county authorized by the provisions of clauses (1) or (2) above, any party thereto may, within five (5) days after notice of institution of suit, make written application to the Presiding Judge of the Administrative Judicial District within which the suit is filed for the appointment of a substitute judge in the court where suit is filed, whereupon such Presiding Judge of such Administrative Judicial District immediately shall assign another District Judge from such Administrative Judicial District who shall thereafter hear all proceedings in such suit. The judge of the court in which such suit is filed shall have full power to act in the case until receipt by him of a copy of an order of the Administrative Judge removing the case or appointing a substitute judge, and the provisions of this Act shall be cumulative of existing rights of the parties to a change of venue as authorized by law. For the purpose of enabling all parties to procure the personal attendance of witnesses in any suit in a court of competent jurisdiction under the provisions hereof the clerk of said court where such suit is pending, if the suit is brought in or removed to a county other than the county where the strike or picketing is alleged to have occurred or the county of the residence of the defendant or any one of the defendants and on the application of any party to said suit, shall issue a subpoena for any witness or witnesses who may be represented to reside within any county in the State of Texas or found therein at the time of trial; and the provisions with respect to the issuance of subpoenas, penalties for failure of witnesses to appear, and the tendering of mileage and traveling expenses as provided in Article 7439a of Vernon's Revised Civil Statutes of Texas, 1925, shall apply.

18. Revision of probate.—Suits to revise the proceedings of the county court in matters of probate must be brought in the district court of the county in which such proceedings were had.

19. Suits against counties.—Suits against a county shall be brought within such county.

20. Heads of departments.—Suits for mandamus against the head of any department of the State Government shall be brought in Travis County.

21. Corporations: charters.—Suits brough by the State for the purpose of forfeiting the charter of a private corporation chartered by Act of the Legislature, or organized under the laws of this State, and for the purpose of canceling the permit authorizing a foreign corporation to transact business in this State, and for the purpose of restraining corporations from exercising powers not conferred upon them by

the laws of this State, and for the purpose of preventing persons from engaging in business in this State contrary to the laws thereof, may be brought in Travis County.

22. Railway lands.—Suits on behalf of the State to forfeit land fraudulently or colorably alienated by railway companies in fraud of the rights of the State, under the laws granting land to railway companies, shall be brought in Travis County.

23. Corporations and associations.—Suits against a private corporation, association, or joint stock company may be brought in the county in which its principal office is situated; or in the county in which the cause of action or part thereof arose; or in the county in which the plaintiff resided at the time the cause of action or part thereof arose, provided such corporation, association or company has an agency or representative in such county; or, if the corporation, association, or joint stock company had no agency or representative in the county in which the plaintiff resided at the time the cause of action or part thereof arose, then suit may be brought in the county nearest that in which plaintiff resided at said time in which the corporation, association or joint stock company then had an agency or representative. Suits against a railroad corporation, or against any assignee, trustee or receiver operating its railway, may also be brought in any county through or into which the railroad of such corporation extends or is operated. Suits against receivers of persons and corporations may also be brought as otherwise provided by law.

24. Carriers.—Suits arising from damage or loss to any passenger, freight, baggage or other property, by reason of its transportation, or contract in relation thereto, in whole or in part by one or more common carriers or the assignees, lessees, trustees or receivers thereof, operating or doing business as such in this State, or having agents or representatives in this State, may be brought against one or more of those

so doing business, in any county where either does business or has an agent or representative.

25. Railway personal injuries.—Suits against railroad corporations, or against any assignee, trustee or receiver operating any railway in this State, for damages arising from personal injuries, resulting in death or otherwise, shall be brought either in the county in which the injury occurred, or in the county in which the plaintiff resided at the time of the injury. If the defendant railroad corporation does not run or operate its railway in, or through, the county in which the plaintiff resided at the time of the injury, and has no agent in said county, then said suit shall be brought either in the county in which the injury occurred, or in the county nearest that in which the plaintiff resided at the time of the injury, in which the defendant corporation runs or operates its road, or has an agent. When an injury occurs within one-half mile of the boundary line dividing two counties, suit may be brought in either of said counties. If the plaintiff is a nonresident of this State then such suit shall be brought in the county in which the injury occurred, or in the county in which the defendant railroad corporation has its principal office.

26. Railroad wages.—Suits by mechanics, laborers and operatives, for their wages due by railroad companies, may be instituted and prosecuted in any county in this State where such labor was performed, or in which the cause of action, or part thereof, accrued, or in the county in which the principal office of such railroad company is situated.

27. Foreign corporations.—Foreign corporations, private or public, joint stock companies or associations, not incorporated by the laws of this State, and doing business within this State, may be sued in any county where the cause of action or a part thereof accrued, or in any county where such company may have an agency or representative, or in the county in which the principal office of such company may be

situated; or, when the defendant corporation has no agent or representative in this State, then in the county where the plaintiffs or either of them, reside.

28. Insurance.—Suits against fire, marine or inland insurance companies may also be commenced in any county in which the insured property was situated. Suits on policies may be brought against any life insurance company, or accident insurance company, or life and accident, or health and accident, or life, health and accident insurance company, in the county where the home office of such company is located, or in the county where loss has occurred or where the policyholder or beneficiary instituting such suit resides.

28a. Fraternal benefit societies and statewide mutual assessment companies.—In all actions brought against Fraternal Benefit Societies and/or Statewide Mutual Assessment Companies, regardless of the plan upon which they operate and whether incorporated or not, growing out of or based upon any alleged right or claim or loss of proceeds due, arising from or predicated upon any policy or contract issued or made by such Fraternal Society and/or Statewide Mutual Assessment Companies, venue shall lie in the county where the policyholder or beneficiary instituting such suit resides or in the county of the principal office of such association or where such cause of action arose.

29. Libel or slander.—A suit for damages for libel or slander shall be brought, and can only be maintained, in the county in which the plaintiff resided at the time of filing suit, or in the county of the residence of defendants, or any of them, or the domicile of any corporate defendant, at the election of the plaintiff.

29a. Two or more defendants.—Whenever there are two or more defendants in any suit brought in any county in this State and such suit is lawfully maintainable therein under the provisions of Article 1995 as to any of such defendants,

then such suit may be maintained in such county against any and all necessary parties thereto.

30. Special venue.—Whenever in any law authorizing or regulating any particular character of action, the venue is expressly prescribed, the suit shall be commenced in the county to which jurisdiction may be so expressly given.

31. Breach of warranty by a manufacturer.—Suits for breach of warranty by a manufacturer of consumer goods may be brought in any county where the cause of action or a part thereof accrued, or in any county where such manufacturer may have an agency or representative, or in the county in which the principal office of such company may be situated, or in the county where the plaintiff or plaintiffs reside.

Supreme Court, U. S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1481

AMERICAN MOTORISTS INSURANCE COMPANY,
Appellant,

v.

VIRGIL B. STARNES,
Appellee.

BRIEF FOR APPELLEE

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AMERICAN MOTORISTS INSURANCE COMPANY,
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Appellee.

APPELLEE'S BRIEF

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES OF AMERICA:

OPINION

The Opinion of the Court of Civil Appeals of Texas, Tenth Supreme Judicial District, appears in Appendix A to Appellant's Jurisdictional Statement at Page A-1.

JURISDICTION

Appellant alleges that jurisdiction lies with this Honorable Court under Title 28, U.S.C. Section 1257 (2). As heretofore stated in Appellant's Motion to Dismiss, the Texas Venue Statute is not repugnant to the Constitution, Treaties, or Laws of the United States and does not violate the "Equal

Protection Clause" of the 14th Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Constitutional Provision and the Texas Statute involved are fully set forth in Appellant's Brief (pp 2-3).

QUESTION PRESENTED

Where there is a substantially common ground for venue for foreign and domestic corporations, can the foreign corporation validly complain of a denial of equal protection of the laws merely because an additional burden is imposed on the domestic corporation by subjecting the domestic corporation to an additional ground of venue.

STATEMENT OF THE CASE

Appellant's Statement of the case is substantially correct.

SUMMARY OF ARGUMENT AND ARGUMENT

The only "Valuable Right" held by the Texas Courts to exist pertaining to venue is that of a defendant to be sued in the county of his residence, subject to certain exceptions. The nearest thing to a "residence" as to a corporation is its principal office, the same being where its books are kept, its stock-holders' meetings are held, its primary officers function and its directors and officers assemble to transact important general business of the company. Thus, it is possible to accord said "Valuable Right" to a domestic corporation but it is impossible to accord such right to a foreign corporation since its principal office, including all of its primary officers, are headquartered out of state. Under the Texas Venue Statute, Article 1995, V.A.C.S., a domestic corporation is suable at its principal office without proof of any cause of action or any other additional venue fact. A foreign corporation's nearest equivalent in Texas to a domestic corporation's "principal office" is obviously those places where the foreign corporation has a fixed agency of a permanent nature in Texas. Thus, by making domestic corporations suable in the

county of their principal office and foreign corporations suable in the county where they maintain a fixed agency of a permanent nature, without any other additional proof as to either, Texas has treated said corporations with the greatest equality possible under the circumstances existing. Texas has construed the term "agency or representative" under the Venue Statute as to foreign corporations to require a place of business of a fixed and permanent nature, *Vines v. Harry Newton. Inc.*, 445 S.W. 2d 260. The fact that Article 1995 went farther and also provided that a domestic corporation could further be sued in the county where the plaintiff resides at the time of the cause of action if there is also a corporate agency in said county or the county nearest to plaintiff's residence at the time of the cause of action where such agency exists, does not give a foreign corporation any ground for complaint — the domestic corporation is the only one that could complain about this additional venue site being imposed upon it. The law is aptly stated in *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 79 S. Ct. 437, 3 L. Ed. 2d 480, as follows:

> "If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law."

CONCLUSION

The Judgment of the Court below should be affirmed and it is accordingly so prayed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 1975, three copies of the foregoing Brief for Appellee were mailed, postage prepaid, to Joel W. Westbrook, Attorney at Law, 1910 National Bank of Commerce Building, San Antonio, Texas 78205, Attorneys for Appellant. I further certify that all parties required to be served have been served.

Fred Horner

Fred Horner

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-1481

AMERICAN MOTORISTS INSURANCE COMPANY,
Appellant

v.

VIRGIL B. STARNES,
Appellee

ON APPEAL FROM THE COURT OF CIVIL APPEALS
OF TEXAS, TENTH SUPREME JUDICIAL DISTRICT

M E M O R A N D U M O N J U R I S D I C T I O N *

Under Texas Law, venue rulings acquire the same finality as judgments on the merits. Wichita Falls and S.R. Co. v. MacDonald, 141 Tex. 555, 174 S.W.2d 951, 952 (1943); Williams v. Pitts, 151 Tex. 408, 251 S.W.2d 148, 149-150 (1952). The Texas court of last resort on this constitutional venue question has ruled against Appellants, and that ruling is, of course, the "law of the case" 4 Tex. Jur.2d, Rev., Part 2, Appeal & Error - Civil Cases §§997-1010 (1974).

Accordingly, if the Supreme Court of the United States does not now decide the constitutional venue question, then it

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*By leave granted in open court on February 23, 1976. The Memorandum is typewritten upon advice of the Clerk.

will not be decided at all within the context of this lawsuit if the Appellants lose in the trial court!* Obviously, it will not be the subject of any appellate review on this question if Appellants prevail in the trial court.

If Appellant had not taken a separate appeal from the trial court's adverse judgment on the constitutional venue question, then it would have been precluded from pursuing the venue question in its appeal on the merits, except possibly in the event the case was tried and appeal on the merits perfected within thirty (30) days of the Order over-ruling the plea of privilege. Inland Refining Co. v. Robinson, 256 S.W. 2d 843 (Tex. 1953).

This Court noted probable jurisdiction also in Exxon Corp. v. Jay M. Preston, 414 U.S. 1038 (1973), a case coming out of Texas on the same constitutional venue question as here presented.

This Court held that the "finality of judgment" doctrine did not preclude review of a Texas venue problem in Mercantile Nat'l Bank at Dallas v. C.H. Langdeau, 371 U.S. 555 (1963).

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*It would appear reasonable to reject as tortuously unrealistic returning this case to the trial court, and, should Appellant lose there on the merits, have us attempt either 1. to appeal directly from the trial court to this Court, or 2. to appeal from the Texas "court of last resort" (assuming Appellant loses at each level) -- in either case taking with the constitutional venue question all the unnecessary freight of non-federal questions. (In this latter case, obviously, to take the venue question again through the Texas appellate hierarchy would be vain and useless, because the Texas "court of last resort" has already ruled against us. That is why we are here)

We believe particularly applicable is the language in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) at page 546:

> "[T]his order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably."

In our case Appellant, absent this Court's review now, would lose the right to Equal Protection of the Laws so as to prevent Appellant from being venue-bound in Appellee's home county without Appellee having to prove a cause of action against Appellant, as he would were he suing a domestic corporation.

Finally, we believe that a reasonable analysis of the procedural posture of this case would place it "[i]n the third category [of] those situations where the federal claim has been finally decided [in the state court], with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." Cox Broadcasting Corp.v. Cohn, 420 U.S.469, 95 S.Ct. 1029, 1039 (1975).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joel W. Westbrook, hereby certify that the foregoing Memorandum on Jurisdiction was mailed by certified mail, return receipt requested, to Fred Horner, Dunnam, Dunnam & Dunnam, 4125 West Waco Drive, Waco, Texas 76710, attorneys for Appellee, on this 26th day of February, 1976. I further certify that all parties required to be served have been served.

Joel W. Westbrook